MARTIAL L

As Allowed by the Law of England,

IN TIME OF REBELLION;

WITH

PRACTICAL ILLUSTRATIONS DRAWN FROM THE OFFICIAL DOCUMENTS IN THE JAMAICA CASE, AND THE EVIDENCE TAKEN BY

The Royal Commission of Enquiry

WITH

COMMENTS, CONSTITUTIONAL AND LEGAL.

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"Inter arma silent leges."

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PREFACE.

The case of Jamaica has directed attention to the subject of martial law in time of rebellion, which has for ages happily been obsolete in this country (*a*), and was always wholly exceptional, and had no place in our institutions; whence it is, probably, that there is no treatise upon it, and that many erroneous ideas have prevailed upon it.

The works of Simmons and M'Arthur on Court-martial, though they contain many passages on the subject entirely in accordance with the views admitted in this work, do not enter fully into it, treating it as exceptional to ordinary *military* law, as it is undoubtedly exceptional to ordinary *municipal* law. And all that it was deemed necessary to say about it in the

(*a*) The origin of all these errors may probably be traced to the fact, that the Petition of Right abolished martial law in time of peace, and that, happily, there has not been in this country, since the Revolution, any state of rebellion that could be deemed to amount to war. And, in Ireland, there were special statutes upon the subject, which, however, recognize and reserve the right of the Crown to declare martial law in time of rebellion. But, practically, in this country, martial law, as Lord Loughborough, speaking in a case in time of peace, said in *Grant* v. *Gould* (2 Hen. Blackstone's rep. 67), "has long been exploded," *i.e.*, *practically* exploded; as it is in time of peace. And hence also, Blackstone, in his Commentaries (vol. ii. p. 561) said, "that martial law in its true sense, has no place in the institutions of this country." But the Mutiny Acts are only necessary to authorize the Crown to apply, in time of peace, those regulations which the Crown may, by prerogative, apply in time of war; and of rebellion, which amounts to war. But the Petition of Right only applies to the realm of England, and not even to Ireland, still less the colonies; and even if it applied to other countries than England, it applies, like the Mutiny Act, in time of peace, and not war (Stephens' Commentaries, vol. ii. p. 561).

"Commentaries on the Laws of England" (vol. ii. page 561) is:—"Martial law may be defined as the law (whatever it may be) which is imposed by the military power, and has no place in the institutions of this country, unless the Mutiny Act, and the Articles of War established under that Act, be considered as of that character." But the Mutiny Act, and the Articles of War, apply only to military persons; and martial law, as here truly stated, is the extension of military law, or power, to the whole population (*a*), and which, from the very nature of such a measure, must necessarily be entirely exceptional and extraordinary, so that it "can have no place in our *institutions*."

As martial law can only be declared in a time of rebellion, which amounts to war, and need not be declared if there is a military force adequate to the occasion (as always has been the case in this country ever since the Revolution), and, therefore, the action of the military, *in aid* of the civil power, and *under* the civil power at common law (which has often been required), has always been found sufficient; there has naturally arisen a confusion between the function or power of the military force, when thus acting in aid of the civil power, and its function or power under martial law (*b*). And from this

(*a*) In the passage above cited from Stephens' Commentaries, it is added, "and though our Sovereign formerly exercised the right of proclaiming martial law within the *kingdom*, that prerogative seems to be now denied to them by the Petition of Right." This is put doubtfully, and only as to the realm, but it is obviously erroneous, for the Crown has lost no prerogative through the Petition of Right, which was directed only against *abuses* of the prerogative, and, on this head, the abuse lay in applying a prerogative as to *war* to a state of peace (*vide* Hallam's Const. Hist. England, vol. i.).

(*b*) Indeed, the bounds between these two functions or powers are not in some cases clearly defined. Thus, Mr. Hallam treats as sophistical the doctrine Lord Mansfield laid down, that the military may, without martial law, act to any extent necessary in suppression of actual insurrection. And when they attack large bodies of people not in arms, nor engaged in any felonious act, as they did in the Lord George Gordon riots, it is, to say the least doubtful, whether what they do is legal, and whether such cases may not require an Act of Indemnity. And to remove the difficulty occasioned by these doubts, is, indeed, one great object of declaring martial law, (*vide post*, pp. 26—30.)

confusion, or from the notion that martial law, in its true sense, has been abolished by the Petition of Right, has arisen all the errors upon the subject.

It is to be borne in mind, that if the subject of martial law has happily become obsolete in this country, it has only been so because, by reason of a standing army, the military force always available in support of the Executive, is so enormous, that no rebellion would have any chance of obtaining any head at all. But it is far otherwise in other countries, our colonies or dependencies, in which the military force is comparatively small, and the English inhabitants are a weak community, surrounded by an overwhelming mass of a population of a different, and, generally, more or less hostile and disaffected race, liable at all events to sudden and hostile influence (*a*).

When, however, the military act in support of the Executive, at common law, that is, to suppress actual riot, or insurrection, they merely act *in aid* of civil power, and are subordinate to it; whereas, under martial law, the military has independent power of action for the whole district, in fact, is placed under military command and military discipline, the only authority being that of the Commanding officer. All the mistakes that have arisen on the subject have arisen from confounding these two different, indeed utterly opposite, state of things (*b*).

(*a*) Thus, Mr. Hallam observes, "that the Executive power has acquired such a coadjutor in the regular army, that it can in no probable emergency have much to apprehend from popular sedition" (Const. Hist. Eng. vol. iii. p. 263). He elsewhere notices, in a note, the immense accession to the power of the Executive, arising from the Riot Act, which, combined with the *actual* power residing in the standing army, makes it irresistible. "Among the modern statutes, which have strengthened the hands of the Executive power, we should mention the Riot Act, 1 Geo. I. 2 c. 5, whereby all persons tumultuously assembling, to the disturbance of the public peace, and not dispersing within one hour after proclamation made by a magistrate, are guilty of felony." The effect of which is, that the military, acting in aid of the civil power, may at once attack them. And so, if the reading of the Act is prevented, as in Jamaica it was, by attacks upon the magistracy, that equally makes the meeting felonious.

(*b*) Lord Mansfield particularly pointed out this distinction, on the occasion of the Lord George Gordon riots in 1780. Every man might, and

It is the more surprising that there should have been any doubt at all as to the effect of the declaration of martial law, seeing that not only great lawyers like Hale (*a*), but our modern writers, such as Hallam (*b*), have distinctly described it as the *suspension* of the common law, and the application to the population of absolute, arbitrary, military power: that is, not for the mere suppression of *actual insurrection*, for which the powers of the common law are ample, but for the complete suppression of *rebellion*, and the restoration of peace and confidence, by removal of all danger of its renewal.

And some years ago, in the case of Ceylon, where martial law had been declared, and acted on, as it has lately been in Jamaica, it was declared, by the highest authorities, both

if required, must, interfere to suppress riot, much more to prevent acts of treason, felony, or rebellion. This doctrine, the Lord Chief Justice stated to be the true foundation *for the calling on the military to assist* in quelling the late riot. The persons who so assisted were, in contemplation of law, [illegible] individuals; and if a military man (*i.e.*, in such case) exceeded his powers, he must be tried and punished, [illegible] by the martial code, but by the common law. Consequently the idea that the metropolis was under martial law, was idle (Adolphus' Hist. Eng. vol. iii. p. 254). That is because they had acted only *in aid* of the civil power. Otherwise, if *it had been* martial law, it is plainly implied, that then the military would only have been liable to martial law, so far as regarded their acts in obedience to orders *under* martial law.

(*a*) Hist. of Common law, c. 1. There, Lord Hale describes it as a distinct and definite thing; the regulations established by the Sovereign, by his prerogative, for the government of the army and maintenance of discipline in time of war. This, by the Mutiny Act, is extended to military persons in time of peace. But, in war, the Sovereign still acts by prerogative (*Barwise* v. *Keppel*, 2 Wils. rep.).

(*b*) "There may, in times of pressing danger, when the safety of all [illegible] demands the sacrifice of the legal rights of the few—there may be circumstances that not only *justify*, but compel the *temporary abandonment of constitutional forms*. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the *suspension of civil jurisdiction*" (Const. Hist. Eng. vol. i. 240). The establishment of martial law, that is, of military power, or the will of the Commanding officer, as the highest military authority has described it, must of necessity involve the suspension of the common law, or, as Hallam calls it, of *civil* jurisdiction. The two things cannot co-exist; whereas, the power of the military *in aid* of the civil power, is, as the very phrase implies, quite consistent with it.

military and civil, that the effect of military martial law was to establish arbitrary military authority, suspending not only municipal law, but even *regular ordinary military* law, and establishing, in short, a state of things in which there is no *law* at all, but the will of the Commanding officer, exactly as in time of war (*a*).

It has lately, indeed, been supposed and stated, that the scope of martial law is the resistance of actual insurrection, or the arrest of rebels for trial at common law, and that nothing more can be done by the military (*b*) under it than can be

(*a*) The Duke of Wellington said, in the House of Lords, on the 1st April, 1851, in reference to the Ceylon rebellion of 1849, "That martial law was neither more or less than the will of the General who commands the army; in fact, martial law is no law at all." And Earl Grey, on the same occasion, said, "that he was glad to hear what the noble Duke had said with reference to what is the true nature of martial law, for it is exactly in accordance with what I myself wrote to my noble Lord Torrington, at the period of those transactions in Ceylon, I am sure I was not wrong in law, for I had the advice of Lord Cottenham, Lord Campbell, and the Attorney-General (Sir J. Jervis), and explained to my noble friend, that what is called proclaiming martial law, is no law at all, but merely for the sake of public safety, in circumstances of great emergency, setting aside all law, and acting under the military power." Sir J. W. Hogg, Chairman of the East India Company, said in the House of Commons, on the 29th of May, 1851, when an hon. member was inclined to carp at the statement of the Judge-Advocate-General (Sir D. Dundas), that martial law was a denial of all law: "But the Judge-Advocate was quite correct; was a denial of all law, and could not be the subject of regulation; when martial law was proclaimed, the Commanding officer must use his discretion." (Parl. Deb. 1851, Ceylon.)

(*b*) Who may, at common law, use any amount of force, and, if necessary inflict death in carrying out these objects, so that if that was all, there would never be any necessity for martial law at all. But this is certainly opposed to all the authorities, ancient and modern, common law or legislative. Thus, Hale describes martial law as the law established originally for the discipline of the army, and applied to the king's army, or the enemy, in time of war (Hale's Hist. of Common Law c. 1). So the Petition of Right recites, as the cause of complaint, that, in time of *peace*, commissions had issued, with power to proceed within the realm, according to the *justice of martial law*, against such soldiers or persons joining with them, as should commit any mutiny or other outrage, and, "by such summary course and order as is agreeable to martial law, and *is used in armies in time of war*,

done, either by soldiers or civilians, at common law, *i.e.*, the resistance of persons in the committal of acts of outrage, or the arrest of those who have committed such acts, and that there is no power of trial of non-military persons by courts-martial; so that, in short, martial law is common law, the declaration of martial law a mere empty form, and worse than a mere form, leading only to a mischievous delusion, in inducing the military to suppose that they can do under it anything more than they can do without it, at common law.

That, after the declaration of martial law, nothing more can be done than could be done before; that the military can only act in aid of, and in subordination to the civil power, as at common law; and that, therefore, all execution of sentences under trial by court-martial are utterly illegal. That there is in reality no power to "declare martial law" at all, or of establishing any other or different state of law than that which exists at common law, under which the military can act to any extent in putting down actual present outrage or riot (*a*), but cannot, when they have *arrested* offenders even in the act, deal with them by way of punishment (*b*).

That the power of the military, after the declaration of martial law as before, is strictly limited by necessity, in the

proceed to the *trial and execution* of such offenders, and cause them to be *executed according to the law martial.*" This is a legislative recognition that, by the "law martial," in time of war, offenders *may be tried*, and this was only abolished *within the realm*, and in *time of peace*. So in the Mutiny Acts, from that time to the *present*, it is martial law in time of peace, which is declared illegal.

(*a*) Lord Mansfield, at the time of the Lord George Gordon riots, expressly stated that this was *not* martial law (Adolphus' Hist. Eng., vol. iii.); and so did Chief Justice Tindal, in the case of the Bristol riots.

(*b*) This view resting on the notion that the Mutiny Act is necessary to authorize trial by court-martial, whereas that only applies to military persons, and is only necessary to enable the Crown to maintain a standing army in time of *peace*; and in time of war the Crown acts by its prerogative, which applies equally to rebellion, because, in law, rebellion is war against the Crown (*vide* Hale's Pleas of the Crown, Hawkins' Pleas of the Crown, and Foster's Crown Law). And the Crown may declare it so to be when it is sufficiently formidable to require such a declaration, and cannot be dealt with at common law (*vide post*, 379).

strict legal sense of present, actual, instant, physical necessity(*a*), for the limited purposes of resistance or arrest, and does not include such powers as may be required, in a larger sense of the word, for the suppression of a rebellion; and that, therefore, as there can never be a *necessity*, in that stricter sense, for the summary trial of a man who may be, and is, arrested and in custody, there can never be such a trial by court-martial under martial law (*b*), and no prisoner can ever be legally *executed*, either by summary enquiry or upon trial by court-martial.

That, therefore (*c*), all such trials and sentences are utterly illegal, and require an act of indemnity, to relieve the actors in such proceedings, from legal, and even criminal, liabilities for their acts in execution of such sentences. And that the parties are entirely dependent upon the bill of indemnity (*d*)

(*a*) At common law, if it be necessary, in the arrest of a person charged with felony, either by reason of flight or resistance, he may be killed (R. Woolmer, 1 Mod. C. C.), and, of course, a man in the actual *committal* of an act of felony, may, if necessary, to prevent it, be killed. And so, by the Riot Act, as to rioters. But these powers are strictly limited, by common law, to *present, instant, actual necessity.*

(*b*) It was not explained whether, upon this new view, *soldiers* are liable to summary trial under martial law, or why, if they are not, they should not be, or why, on the contrary, if they *are* so, other persons, equally under martial law, are *not* so. It is obvious, indeed, that, as already pointed out, upon this view, martial law is simply nothing at all, or rather worse than nothing, "a mockery, a delusion, and a snare."

(*c*) This is directly opposed to repeated declarations of the Legislature, even in our own times, not only negatively, in the Mutiny Acts not denying the power of the Crown to declare martial law in time of *rebellion*, but *affirmatively*, in several acts distinctly and expressly *declaring* that power, as, for instance, the Irish Acts, 43 Geo. III., 117, and the 3 & 4 W. IV., c. 4.

(*d*) This, again, is an entire error; no act of indemnity is legally necessary, for acts done under, and in the execution of martial law, as to persons coming under its operation, and within the time and place of its operation; and no instance will be found of any act of indemnity purely for such acts. Acts of Indemnity, as, for instance, the Irish Acts, already alluded to, or the Jamaica Act, are much larger in their scope, and protect acts done under martial law before declaration, or after its expiration, or in places where it has not been declared, or such irregularities as are likely to occur—as, for instance, acts done without military order, but honestly in

for protection from criminal prosecution, for those acts which may have preserved to the Crown a valuable colony, and preserved its population from massacre. Of course, if such a conclusion be *law*, it must be so, however monstrous it may seem; but it assuredly deserves consideration whether it *be* law. Because, if it is so, men called upon to act in such emergencies may decline to incur such formidable criminal liabilities in mere reliance upon a bill of indemnity, which, as we have seen, may be resisted, suspended, or rejected.

It was attempted to support these views by the publication of an opinion, obtained from two very eminent lawyers, not likely to be wrong on any legal question on which their minds had been fully and fairly brought to bear, but which was written upon the representation that there *had not* been a rebellion (*a*) such as would have justified martial law, in its strict and proper sense, and therefore was written rather with reference to its secondary or more popular sense, of the power of the military in the suppression of actual insurrection, which is, or may be, merely a power *in aid* of the civil power, and subordinate to it.

Moreover, it was expressly stated in that opinion (*b*), that

the suppression of the rebellion, and so forth—and it was no doubt in this sense only that the officers of the Crown in 1849, in the case of Ceylon, were said, or were stated to have said, that a bill of indemnity was required; that is, was practically required, for errors certain to occur.

(*a*) It was published on the 16th of January, and had been written some time before, upon no other facts than those disclosed in the first dispatches received, which it was considered by many hardly disclosed sufficient facts to show that there had been a rebellion. And these eminent lawyers were careful to add that they could not say there might not be facts which could afford a justification for what had been done, although they could not see such facts in the face of the first despatches. It is obvious, therefore, that they did not apply their minds fully to the question of the lawfulness of martial law in time of rebellion, but to that which some insist is to be *deemed* martial law, and certainly is *included* in it, the power and function of the military in aid of the civil power in the suppression of actual insurrection, and throughout their opinion it is obvious that they have *this* in their mind.

(*b*) "Martial law is the assumption of the officers of the absolute power exercised by military force for the suppression of *insurrection* and the *restora-*

the powers to be executed under martial law might be carried to any extent necessary, not only for the suppression of insurrection, but for the restoration of order and lawful authority; and nothing more could be required, for a full definition of martial law, than to add that of the measures necessary for this purpose, and their continuance, the military Commander alone must judge, and that there may be all such measures as are applicable to the army, or the enemy, in time of war, including that which the Petition of Right expressly recognizes as an essential part of martial law, the summary trial and execution of offenders.

It is not, therefore, clear that, putting a reasonable construction upon this opinion (*a*), the author may not be entitled

tion of order and lawful authority. The officers of the Crown are justified in the exercise of force, and the destruction of life and property to any extent that may be required for the purpose. But they are not justified in inflicting punishment after resistance is suppressed, and after the courts can be re-opened. And courts-martial, by which martial law, in this sense of the word, is administered, are not, properly speaking, courts-martial, or courts at all, but are mere committees formed for the purpose of carrying into execution the extraordinary power assumed by the Government." All which is quite accurate as to the power of the military in aid of the civil power in suppression of actual insurrection, but has no application to martial law, in the strict sense of the term. Because, as to that, it practically leaves the whole question open; for what is "necessity," and *who is to judge of it?* And with reference to what? To actual insurrection only, or rebellion, which is quite different? And again, is it "necessity" with reference to the instant exigencies of the particular time or place at which any particular act is done, or with reference to the larger considerations applying to the suppression of a rebellion, which may render necessary, in that sense, acts not necessary in the narrower sense.

(*a*) Putting a reasonable construction on the opinion, this seems the result of it. It is intelligible to tell the Commander that he may do all that he deems necessary to suppress the rebellion, and subject, of course, to the control of the Governor or Viceroy, and of the Crown, and of Parliament, amply sufficient to prevent or to excuse any error or excesses, in the honest pursuit of the object; excesses which mght arise, from causes over which he had little or no control; false information, exaggerated apprehension, the general state of alarm, &c. But it would be idle to tell a General to do all that might be thought necessary, in the opinion of a Middlesex jury, some months afterwards. No one would act under such a liability.

even to appeal to the high authority of these eminent and able lawyers, for they expressly affirm the lawfulness of *any* measures which the military Commanders may deem necessary; and it would seem to follow that he may judge of their nature and continuance, and that they may include deterrent measures, and that if, in his judgment, execution upon summary enquiry, or on trials of court-martial, are necessary for the speedy punishment of offenders, such trials might be lawful. It was, however, maintained that martial law has, in reality, no effect at all, and that all trials and executions under it are illegal (*a*).

The Author has ventured to put forward a view of the law which certainly leads to very opposite conclusions, that is to say, that rebellion is a state of war (*b*) in which subjects throw off their allegiance, and justly lose the benefit of that common law which they, by their own acts, disturb; that this state of war suspends the operation of the common law, as regards all measures taken under military order and authority in carrying out martial law; and that, as against those who have caused it, the state of war is deemed to have commenced when they began the rebellion. That the declaration of martial law is only that mere formal *recognition*, by the Crown, of the existence of this state of war, and does not so much *cause* it as *declare* it.

That the declaration of martial law is the acceptance and recognition by the Crown of the state of war thus

(*a*) It was stated that above a hundred prisoners who had been tried by courts-martial under martial law in Jamaica, and sentenced to imprisonment or penal servitude, were released by the Colonial authorities, on some such notion as this (*vide post*, p. 388 and p. 411). Logically, this view would involve the conclusion that *all* the sentences were illegal, and all the executions murders. It is hoped, therefore, that the step was taken on some other ground, probably on some considerations of policy, or clemency.

(*b*) That is *rebellion*, as distinguished from *riot*; a rising or insurrection of a general character, or likely to become so from its nature, with or without any organization, by reason of the general nature of the objects, and the common feelings of disaffection, in which it has had its rise, and the instinctive sympathies by which it is likely to extend and spread, especially when it is a rising of a *class* or *race*. It has never been doubted in our law, that an armed rising, with a general unlawful

already began, and forced upon it, by its rebellous subjects (a war, be it observed, on their side, not lawful, but criminal), and that it has a definite effect, which exposes them to the penalties and severities, while it does not confer upon them the privileges or powers of war. That its effect is to place under martial law, that is under military *power*, all the inhabitants of the district, and subject them to the severe military discipline, which is enforced in time of war, among the forces of the Crown (*a*), and those who aid the rebels to the severe military measures which are put in force against the enemy; not merely, be it observed, those which are applicable to a lawful enemy in honourable war, but rather those which apply to the forces of the Crown in a state of mutiny, or to the soldiers of either side who are pursuing irregular warfare as stragglers and marauders; in short, such as are applicable to rebels, who are criminals, as well as enemies.

That is, that the effect of declaring martial law is, to apply to the whole population, not, indeed, the actual *terms* of the Mutiny Acts (*b*) and Articles of War (which *in terms* only

object, is a rebellion; for example, a rising, with a view to expel or exterminate a class of the population, or acquire the possession of waste lands, and the like. (See the authorities cited, pp. 2, 25).

(*a*) This certainly is the import of the declaration of martial law which (*vide post*, p. 127) proclaims that the military may treat as enemies all whom they consider to be in hostility against the Crown or its loyal subjects, and it is always understood and stated to be as above declared. Thus it is stated in Simmons on Court-martial, that the effect is to apply military law or power to the whole population. So Sir D. Dundas declared in 1850, so Mr. Headlam, the Judge-Advocate-General, stated in 1859 to the Defence Commission (*vide post*, pp. 109, 379).

(*b*) The Mutiny Acts are only necessary to empower the Crown to keep up a standing army in the country in time of peace for a country in a state of war. The Crown acts by its prerogative power over the army (*Barwise* v. *Keppel*, 2 Wils. rep. 314). And this prerogative power exercised by the military Commanders in time of war, in a country in a state of war, is an arbitrary, discretionary military power (*Johnstone* v. *Sutton*, 1 Term reports). The Mutiny Acts, moreover, merely enact that the Crown may make articles of war, and that the articles of war so made shall be recognised for military persons (*Grant* v. *Gould*, 2 Hen. Blackstone's rep. 68), but the proviso that no offence shall be punished with death, except those thus specified, does not apply abroad (*R.* v. *Suddis*, 1 East. rep. 316).

apply to military persons), but that military law, or rather, arbitrary military power, which the Crown, apart from Mutiny Acts and Articles of War, possesses and exercises, by virtue of its prerogative over military persons in time of war, and in a country in a state of war, may exercise, so far as in the judgment of the military Commander is necessary, over the entire population. That these measures may be either repressive, aggressive, or deterrent, and include not only measures in the field, but also summary powers of punishment, with the penalties usual in military law.

That the effect of martial law is to establish an absolute discretionary military authority, such as the House of Lords have held (*a*) exists in a state of war. That the nature of the measures to be taken in the field must entirely depend upon the nature of the rebellion to be suppressed, or of the warfare to be subdued. That, as the war on the side of the rebels may not be carried on, in the manner of regular warfare, by open encounter in the field, and active resistance, so the measures taken for the suppression cannot be restricted to such encounters, or to the suppression of such resistance, nor can its severities be necessarily limited to men found in arms. That if a warfare is carried on by the rebels by means rather of the terror of numbers, and immense preponderance of physical force, and by means of ravage, pillage, and devastation, rather than by the use of arms, the measures of suppression must be adapted to that irregular mode of warfare; and that if bodies of rebels, after committing acts of depredation and devastation, withdraw into thickets and forests upon the approach of the military, for the very purpose of avoiding encounter, and in the hope of lurking there in shelter until the military are exhausted or withdrawn,

The general principle is, that the Crown had absolute discretionary power over the army except it is limited by the Mutiny Acts and Articles of War; but where they are silent, that power holds and is recognised (*Bradley* v. *Arthur*, 4 Barn. and Cress. rep. 304). And they do not limit the power of the Crown out of the realm in time of war.

(*a*) *Johnstone* v. *Sutton*, 1 Term reports (*vide post*, pp. 78—79).

when they may resume the insurrection with impunity, the military may be forced, in carrying out martial law, to attack such hordes of men, whether armed or unarmed, with the view of dispersing them, driving them from their shelter, and compelling them to surrender; and that if the military cannot in any other way get at them, to capture them, they may be forced to fire at them, in order thus to drive them out and make them surrender. That, in short, the measures to be taken in the field must necessarily depend upon the nature of the rebellion and the judgment of the military Commander. And that, as to the mode of dealing with prisoners captured, it must be governed by the same judgment, or the usages of the service, in cases of rebellion or mutiny, and not either on the rules of common law or the rules of regular war (*a*). That if the exigencies of the emergency would admit of the dilatory course of proceeding, it would not be a case for martial law at all; but that, assuming martial law to be in force, it is an absolute practical necessity that it should comprise the power of dealing summarily with prisoners, and that by "the justice of martial law" (*b*), according to the Petition of Right, prisoners who have taken part in the rebellion are liable (*c*) to

(*a*) According to which, persons would be entitled to be kept until exchanged or released, which can hardly be the treatment to which captured rebels are entitled, as they more resemble marauders who are liable to instant execution. On the other hand, when the military are merely acting in aid of the civil power at common law, they cannot deal with prisoners at all, but must hand them over to the civil power to be regularly tried. If the emergency would admit of this dilatory course, it would not be a case for martial law at all; the theory of which is, that, by reason of the convulsion caused by the rebellion, the ordinary law cannot take its course, or that, even if it *could*, it would be far too dilatory to meet the emergency.

(*b*) *Vide post*, p. 11.

(*c*) As already mentioned, and as noticed by all our old lawyers, a rebellion may be formidable, and, if allowed to go on, fatal; although, at the outset, there may be few, if any, arms in the hands of the insurgents. They may by force of numbers overpower any resistance, and speedily possess themselves of arms; and they may, in the meanwhile, by means of arson and devastation, spread desolation and ruin in a few days over a fertile country.

instant trial and execution, whether actually found with *arms in their hands*, or not: arms being only one of many means of carrying on a rebellion, and spreading devastation and ruin through a country.

That the effect of martial law being to apply military rule to all the inhabitants, they are all equally liable to trial by court-martial, not indeed for mere civil offences, but for offences connected with and arising out of the rebellion, and therefore cognizable by the "justice of martial law." And whether or in what cases such courts should be assembled, or more summary enquiries shall suffice, is one of the matters which, like the question, whether deterrent measures are necessary at all, and like all other matters under martial law, are entirely under the control of the military Commander. But if he orders such courts to assemble for the trial of persons, military or non-military, for such offences, whether or not in conformity with regular and ordinary military law (*a*), they are as much lawful tribunals as courts-martial so assembled, and their sentences fully as legal as those of any court, civil or military.

That, of course, therefore, for carrying out such sentences, no one can require a bill of indemnity (*b*), and that for none of the measures under military order and authority, under or by virtue of martial law, can any one possibly be liable, civilly or criminally, or require such a protection (*c*); and that, so far as regards measures so taken, it is not material to their legality, that they turn out in the event to have been excessive; and that whether or not they may be censurable or even culpable on that account, persons cannot be *criminal* for directing or carrying them out honestly, however erroneously, in obedience to orders, and under martial law.

(*a*) Which requires a general court-martial in capital cases, but in the Ceylon case it was fully established that this did not apply in times of mutiny or rebellion; when all such rules are suspended or dispensed with. And see per Macdonald, C. B., in Governor Wall's 28 Sta. Tri. (*vide post* p. 84), where he seems to recognize the same doctrine.

(*b*) Which may, however, be necessary to save doubts as to jurisdiction in particular cases.

(*c*) Though it may be necessary for acts done without order or authority.

That, therefore, no bill of indemnity (*a*) is necessary to protect those who, under martial law, *i.e.*, after its declaration, before its cessation, and in the district proclaimed, have given or obeyed orders, under the supreme military authority, in carrying out measures of martial law, including courts-martial; but that it can only be necessary, and is only available, for the protection of those who have, either before or after the declaration of martial law, or out of the district (*b*), assumed and acted upon the powers of martial law, or have acted honestly for the suppression of the rebellion, without military orders, or beyond their orders or their powers under military law.

That there could be no really criminal liability for measures taken under martial law and military order, nor acts done honestly, however erroneously, in the suppression of the rebellion, though there might, technically and legally, be such a liability for acts done without order, and not under martial law, though honestly in the suppression of the rebellion; and that the bill of indemnity would only cover (*c*) such acts, and

(*a*) Thus it was that the Irish Act (43 Geo. III.) afforded an indemnity for acts done under the assumed powers of martial law, without its declaration, &c., (*vide post*, p. 42—85).

(*b*) As in the arrest out of the district of persons who had been implicated in the rebellion; whose acts may have been out of the district, or before the declaration of martial law. In the author's opinion, for reasons fully explained in the work, the arrest of persons out of the district for *acts done in the district*, would be within the powers of martial law, by analogy to the fundamental principle of common law, that the trial of crime is local; but others might be of a different opinion, and, perhaps, for such acts, a bill of indemnity may be proper, even if not strictly *necessary*, to prevent any doubt that might arise. So as to other irregularities, acts without orders, &c. These matters form the proper scope of a bill of indemnity.

(*c*) It is as much an error to suppose that a bill of indemnity *covers everything*, as to suppose that it is required for everything. It is not required for measures taken under martial law, however erroneously; it *is* required for measures *not* taken under and by virtue of martial law but *honestly* for the suppression of the rebellion. It will *not cover* acts not done for that purpose, but wantonly and wickedly. A reference to the terms of the Irish Act, or the Jamaica Bill, will suffice to prove this. No bill of indemnity that was ever drawn was wide enough to cover acts of really wilful murder; but only acts which might, technically, through want of

would not cover acts done under colour of martial law, *not* honestly for the suppression of rebellion, but wantonly, recklessly, from private malice, or mere thirst of blood.

For it is to be carefully borne in mind that the protection afforded by the common law applies only to those acts which have been really done in carrying out martial law (*a*), that is, under and by virtue of the military authority which it establishes, and does not apply to acts voluntary and wanton, and *not* under orders. So, also, it is to be observed, that the officers who have acted, are responsible to the Crown and to Parliament for the measures they have directed, and the acts they have approved, under martial law, and those acts and measures may be censurable, even though lawful.

These propositions appear to be implied in the opinions of the Judge-Advocate-General of the late and present Government (*b*), and in the issuing of the Royal Commission to enquire into the measures taken in the suppression of the recent rebellion in Jamaica, on account of alleged "excessive and unlawful severities" in those measures of suppression (*c*). For if

legal authority, be deemed so. No legal authority covers acts done under colour of it. The bill points, therefore, to acts in the *suppression of the rebellion*. If the Provost Marshal, in executing a man for threatening his life, had not, under martial law, authority to do it, but an officer might have done it, then it would be covered by the bill. If he did it under martial law, it would not require the bill. If he did it wickedly, not really thinking that his life *was* threatened, but *pretending* to think so, it would *not* be covered by the bill. But such a case is, to say the least, exceedingly improbable and unlikely to occur (*vide post*, p. 375).

(*a*) The House of Lords has established the great legal principle, that a man cannot set up an authority unless he has *really acted* upon it. (*Lucas* v. *Nockells*, 10 Bing.) In the case of a common law authority, which is definite, this means that what may be done is what is directed, and no more; in the case of a more general or discretionary authority, it means that the party must have had an authority—as, that conveyed in martial law, and military order;—and that he honestly intended to pursue the authority, however mistaken he may have been, and however excessive the measures may have been, through mistake, false information, exaggerated alarms, undue excitement, &c., all of which may have been more or less *censurable*, though not *criminal*.

(*b*) *Vide post*, p. 107—109.

(*c*) *Vide post*, p. 257—297.

A TREATISE ON MARTIAL LAW.

PART I.

ITS NECESSITY, AND THE POWER OF DECLARING IT.

LAWYERS and laymen are alike apt to assume that the common law, which, as the term implies, is the common municipal law of the realm (*a*), and directs the proceedings of the ordinary courts in ordinary times, or times of peace, is the only law applicable, even in ordinary times, and even in great pressing emergency, in which however, that law gives way to another which it embraces and includes (*b*), and yields upon which its own authority rests—the public good and safety of the realm, according to the old maxim, *salus populi suprema lex.*

(*a*) "The common law—the common municipal law which is the common rule for the administration of [illegible] Hist. Com. Law, c. 3.) "This is that law by which [illegible] the King's ordinary courts of justice are directed." *Ibid.* c. 2.

(*b*) "The common law, besides those more common and ordinary proceedings, includes within it the laws applicable to divers matters of very great moment; and they are but parts and branches of it. *Ibid.* Thus it includes *Lex Prerogativa*, as it is applied to that great business of the King's prerogative." *Ibid.* One part of that prerogative, it is well known, is the power of proclaiming a state of war, whether with foreign nations, or by reason of internal rebellion; for rebellion is, in law, a state of war, whence it is that the levying war against the Crown is one of the overt acts of high treason.

But the common law has always (*a*) recognised the right of the Crown in a state of war, which requires stern, strict, and summary discipline, to lay down such orders and rules of discipline as may be fit to enforce in the army, either among themselves or towards the enemy; and in such a state these rules, and the usages of war, form the basis of what is called martial law, which is, in fact, no settled or regular law, but a kind of military power indulged in a state of war.

And as civil war is as much war as war with a foreign power, and rebellion is a state of civil war between the subject and the Sovereign, it has always been considered by the common law that rebellion is a state of war, and the levying war against the Crown an act of treason (*b*). By reason of the prerogative of the Crown, the common

(*a*) "The Kings of the realm, preparatory to an actual war, were used to impose rules and orders for the due order of their soldiers" (what are now called Articles of War), "together with certain penalties on the offenders, and this was called martial law. But touching martial law: it is to be observed that, in truth and [illegible], it is not a law, but something indulged rather than allowed as a [illegible] necessity of good order and discipline in an army is that only [illegible] give these laws a countenance. And the indulged law was only [illegible] members of the army, or *to those of the opposite army*; and [illegible] of martial law, whereby any person should lose his life or lib[illegible] be permitted in time of peace, when the King's courts are [illegible] persons to receive justice according to the laws of the lan[illegible] law, which is rather indulged than allowed, and that only [illegible]sity, in time of open war, is not permitted in [illegible]ary courts of justice are open." *Ibid.*

[illegible] Crown, vol. 1. c. xiv., "of levying war against [illegible]ison. He goes on, indeed, to state, that to make it tr[illegible] ing of war not only against the King, but within the realm, [illegible]erial for the present purpose, except, indeed, to reveal another of those defects or deficiencies in the common law, as applied to occasions of great public peril, to supply which is one of the objects of martial law, especially in our colonies and dependencies abroad. For, by the common law, it is not treason to levy war against the Crown in such distant dependencies abroad, because it has no tendency to depose or dethrone the Sovereign, and is not, as Hale shows, within the statute of treason. However, for the present purpose, that is not material, for the point, here, is not what is treason, but what is a levying war against the Crown, as to which Hale is full and explicit; and it is *that* which justifies the declaration of a state of war and the proclamation of martial law.

law deems it, on the one hand, any rising in arms for a general object, except under the authority of the Crown, a levying of war against the Crown; and, on the other hand, although it allows a self-defence, does not allow of the subjects waging war, even in defence of the Crown, without the commission or authority of the Crown or its representatives.

The highest authorities on our law (*a*) declare that the ordinary course of the law prevails only in time of peace; but when the peaceable course of justice is stopped by invasion or rebellion, then it is deemed to be a time of war, as *inter arma silent leges;* the common law does not interfere in time of war.

If there be a state of rebellion even within the realm, against which the ordinary course of law is of no avail, that is, if, within the legal meaning of the phrase (*b*), the

(*a*) "When the courts of justice are open to distribute justice to all, it is said to be a time of peace. But when, by reason of rebellion, &c., the peaceable course of justice is stopped, then it is said to be a time of war. It shall not be tried by a Jury, but by the Judges, whether justice at such a time has her equal course of proceeding or no. For time of war doth not only give privilege to them that are in the law, but to all others within the kingdom. The military rule includes the soldiers; but in time of war, particular orders are always made for the due order and discipline of the soldiers, which we must consult upon all emergencies, and not expect any standing or perpetual war on that account. But it appears that if any one in time of peace put to death any man by colour of martial law, it is murder, and contrary to Magna Charta." (Wood's Institutes, B. 1, c. v.) But in a state of war, the common law has never interfered with the army, *inter arma silent leges.* (Barwise v. Keppel, 2 Wilson's Rep. 318.) Before the Petition of Right, martial law might on occasion be declared in time of peace, and that act only relates to the realm of England. So in the great case of Johnstone v. Sutton, 1 Tenn. Rep. 549, which went to the House of Lords, and is the leading case on the subject, it was solemnly held, in accordance with the case just cited, that for the abuse of a military discretionary power in time of war, the courts of common law have no original jurisdiction; for that what was an abuse, and whether it was abuse or not, is a question so much dependent upon military exigencies and military considerations, that a court of common law will not take cognizance of it, and a jury could not judge of it.

(*b*) This must be the meaning of the phrase, as, indeed, it is paraphrased in the passage cited from Wood's Institutes, for in any other sense it would

courts of law are not open—that is, not really and practically open—for remedy or redress, so that the common law cannot have its course; then the declaration of martial law is allowable.

Levying war against the Crown was always, by common law, an act of treason, and betrayal of allegiance, and forfeiture of protection. Hence, when the subjects declared or levied war against the Crown, the common law recognised the right of the Crown to levy war against them; and then those against whom it was declared were placed in the position of enemies, and became subject necessarily to martial law, and could no longer claim the benefit of those rights of the common law, the course of which they had thus disturbed and set at nought. This was the origin and theory of martial law, as applied to the civil subjects of the country. By a rising in rebellion, they had forfeited their common law rights; by renouncing their allegiance and subjection, they had lost the protection which is its correlative. By acting as soldiers, and levying war, they had become liable to be treated as soldiers, and subject to the laws and usages of war; and this applied necessarily to the whole country or district declared to be under martial law and in a state of rebellion; for in a time of rebellion there can be no neutrality, and neutrality itself is a crime;

be absurd. It would not matter that the courts were sitting or open, in the sense that process could be obtained or proceedings commenced, if the law could not, so far as the rebellion was concerned, have its course, either because of the *great number* of the offenders or their great power; their ability to resist arrest by the ordinary civil power, and the difficulty of identifying and charging the actors in particular outrages, and proving *specific* charges against them, which is necessary in order to a criminal prosecution. It might be that there were some thousands of rebels or rioters who had committed among them considerable atrocities, either in the way of murder, plunder, or arson, &c., not one of whom could be arrested or identified, and committed for trial upon proof of any specific offence; and this is especially likely to be the case where bands of rebels rise in different districts, nearly at the same time, and thus embarrass and alarm the civil power of this country. In such a case it would be idle to say that the courts were "open."

so that those who are not active on the side of the Crown may be lawfully treated as enemies, as well as those who are active in the rebellion.

No man has a right by law to be neutral in a time of rebellion. The law imposes upon all able-bodied subjects in time of rebellion the obligation and duty of doing their utmost to serve the Crown, and suppress the rebellion. Hence it is that, by common law, the Sheriff can call out the whole *posse comitatus*, the whole power or force of the county to assist him in quelling a rebellion, and those who neglect or refuse to do so are deemed criminal, and are indictable and punishable for the refusal. This is the true origin and theory of martial law. It takes its origin from that principle of the common law: the right and duty of every subject in time of rebellion to assist the Crown in putting it down. Those who do not do so, the Crown may treat as enemies, as well as those who are active in rebellion; and thus, by declaring a state of rebellion, or proclaiming martial law, and then treating all who are not acting against the rebellion as parties to it, no injustice is done to any one, and the principles of the common law are only carried out: though carried beyond the *course* of common law.

The magistrates (*a*) are at common law all empowered to raise the power of the country to assist in suppressing any riot, either on their own or upon credible information of a notorious riot, even at a distance, whether there was in truth such a riot or not, and all men, officers or private persons, soldiers, and such as are authorized to assist in suppressing a riot and arresting those implicated; but then,

(*a*) Hawkins' Pleas Crown, 65. The magistrates, at common law can only arrest offenders, and cannot kill, unless necessary to disperse a felonious mob, nor kill a person resisting arrest unless charged as a felon: for which reason the Riot Act made it felony after proclamation read, &c. Hence the exercise of the common law power to suppress a riot or rebellion by force of arms is always attended with great risk, as is laid down by all legal writers, (vide *ibid*), and this was the real difficulty in the Lord George Gordon riots, and the riots at Bristol, &c., the risk, at common law, of killing a person not actually engaged in a felonious outrage.

there is great risk, at common law, in the use of deadly weapons, or in the killing of those in a mob who are not guilty of felony; and therefore there is always great risk and peril in thus acting at common law, in an indiscriminate attack upon any unlawful assembly.

By the common law, no doubt actual rebellion may be resisted and suppressed by force; but then, in the first place, that supposes and requires a force adequate to the purpose; and if such force is limited to mere resistance of acts of violence, a small will not avail against an overpowering force; and, in the next place, in the use of deadly weapons against riotous assemblies, there is at common law great risk of legal liability if persons are killed in indiscriminate attacks on rioters, who are guiltless of any participation in felony; and further, where there is a widespread disaffection, and a great preponderance of force on the side of, and in sympathy with, the rebellion, there is no safety for the inferior force, unless, as in war, there be such indiscriminate attacks upon any bodies of men in the rebellious district, as can scarcely be safely made, unless martial law has been declared, and thus the strict rules of the common law suspended and got rid of for a time, so as to allow of the full and free use of all military measures which military usages shall suggest, without fear of legal liability.

And even as regards actual riot or rebellion, there may be a necessity for a much more indiscriminate attack upon those apparently assembled as rebels, than can be deemed safe at common law (*a*); and, moreover, the rebellion may exist,

(*a*) The real difficulty in suppressing a riot or rebellion at common law is the difficulty of justifying a general and indiscriminate attack upon any body of men met with, assembled together; for in case of homicide at common law, it is necessary to prove by legal evidence that the persons slain were slain in some felonious act, or in resisting arrest on some charge of felony, or in compassing some treasonable purpose, to which the proof of guilty intent is necessary. A number of men cannot be safely attacked with deadly weapons, merely because they are unlawfully assembled, for that is a mere misdemeanour, and at common law the *onus* of proof of justification is thrown upon the person who has committed the act of homicide; and

though actual outrages have been averted; and, where the rebellion is believed to be widespread, and the result of popular feeling, and the force at disposal small, there may be a necessity for acting, by way of anticipation, without waiting for actual attack, against persons thus in a state of rebellion, and taking measures which common law may not warrant.

Those who have the control of the armed force, civil or military, to be used in suppressing rebellion, are, under the common law, constantly harassed and paralysed by the fear of using it against those who may be comparatively, if not entirely innocent; and, on the other hand, the great numbers, and the roving, ambulatory character of the rebellious or riotous bodies of men, renders it practically impossible to arrest and identify offenders, and give legal proof against them of specific offences; as it is necessary to do, unless they are fixed by strict legal proof with a felonious or treasonable conspiracy, so as to make them liable for the felonious acts of others; and thus, again, it will be probably impossible to prove, even if such conspiracy exists, as it may not, even in the case of the worst and most dangerous insurrections. Thus, whether with regard to the common law powers of suppression or of prosecution, they are almost useless in the case of a rebellion, if it has any great diffusion and extension.

The common law, while on the other hand it made felonies capital, and therefore, with consistency, allowed felons to be resisted, if need be to the death, and to be arrested also, at the sacrifice of life, did not allow life to be taken for mere misdemeanour; and unlawful or riotous assemblies were, in themselves, apart from any felonious outrage, or treasonable design,—no more. Hence there was great difficulty at common law in dealing with a rebellion; for it could rarely be put down without an armed force and the

it is impossible to prove a justification on the score of self defence, if they have been *first attacked* with deadly weapons, and are *not* proved to be felons or traitors, which the mere fact of unlawful assembly, or of acts of outrage by others, will not prove.

use of deadly weapons; and though these might be used against persons engaged in a felonious purpose, yet it was otherwise of mere unlawful assemblies, and in time of rebellion such assemblies are so ambulatory, so constantly changing, that the body of men at a given spot, where felonious outrage has been committed, may not be the body of men by whom it has been committed, and may be mere rioters, whom it may be, at common law, unsafe to attack.

And hence, at common law, in early ages, before the time of standing armies, the crown was accustomed to assume, in time of rebellion, the power or the part of acting with military power, when there was a degree of lawless violence and outrage, with which the ordinary civil power was unable to struggle, and which might or might not have the character of rebellion.

Such risings might have that character of rebellion without any actual combination or conspiracy, when they were the result of what is far more dangerous—some common cause,—some common feeling of disaffection or animosity of class, likely, upon some little provocation, to be raised, as fuel is kindled by a spark, into a widespread flame of rebellion (*a*).

This state of things has not been for many generations witnessed in this country, but in former times, in days of serfdom, when it often did exist (*b*), it was and

(*a*) Of this nature were the numerous insurrections of the serfs and villeins, and labouring classes, which took place in the earlier part of our history, and which were never suppressed without much bloodshed. There was never any actual combination; the low degree of intelligence at that time existing among the lower orders precluded it. But there was, what proved infinitely more formidable, a common feeling of hatred for the classes above them, and a common sympathy in that feeling, which was ready to be fired in a moment, by any casual spark of provocation and resentment, into a terrible insurrection. Our own history and that of many other European nations, teem with illustrations of this in former times.

(*b*) We are apt to forget that those phases in the progress of a nation which we have long ago passed through—serfdom, for instance, or villeinage, and the legal or local inferiority of a large class of the population, which

could only be met and dealt with by martial law; and in those times, our Sovereigns sometimes resorted to that stern remedy, when there was a dangerous degree of lawless violence, not of the character of rebellion, but only of the character of a great accumulation and aggregation of acts of outrage, without any common purpose or object.

These instances (*a*), many of which are mentioned by our historians, were not objected to at the time, because the necessity excused them; but when the state of things which excused them had passed away, our ancestors became more jealous for personal liberty, and of the power of the crown enacted, in the Petition of Right, that, within the realm, martial law should no longer be proclaimed in time of peace, but that it should only be proclaimed in time of war or rebellion.

The state of things (*b*), which led to these outbreaks have

always causes class hatreds; at the present time, it characterizes other portions of our world-wide dominions and dependencies, and therefore that the law which in this country has happily been made obsolete for ages, is just as applicable, in our own times, to those distant territories where that state of things either exists, or its abolition is so recent that it has left behind smouldering animosities which may at any moment break out as they did in this country in the middle ages.

(*a*) *Vide* Hume's Hist. Eng. vol. v. p. 154. Hallam's Const. Hist., vol. i. p. 242. These instances are quite distinguishable from cases of rebellion, because however numerous the robbers might be, and even though they were about in parties, there was not only no conspiracy or combination (except perhaps in such small parties as engaged in robberies together), but there was no common feeling and no common object, which could lead to a general combination among them. They shared, it is true, a common predatory instinct, but each had his own purpose, and it was purely selfish and separate, and had not the character of a common feeling of hatred or animosity to another class, which binds men together by an instinctive sympathy.

(*b*) The state of villeinage or serfdom which, of course led to constant heartburnings and hatred of class against class; and, even long after its abolition, by reason of the numbers of unemployed labourers about, there were continual rebellions. The last case of villeinage was in the reign of Elizabeth; and even that was a solitary case, and the system had practically died out, and about the time of the Petition of Right it became legally obsolete by the abolition of feudal tenures. But there were

passed away, and the age has long been remote in which even rebellion would be likely to become formidable. In this country, too, the spread of intelligence and enlightened freedom has rendered it extremely improbable that there will ever again occur a state of rebellion which would justify martial law, so that it is, as regards this country, a question purely speculative and constitutional, and it is only in our distant dependencies that it has any practical importance.

There, it may be vital, of terrible importance, for it may at any moment afford the only really effectual means of suppressing a formidable rebellion which, if once allowed to make head, will be fatal. The state of things supposed is the exact reverse of what happily prevails in this country. Here, there is certain to be a vast preponderance of force on the side of law and order, and the consciousness of this gives confidence to the loyal and weakness to the disloyal, so that the ordinary power of the law, at all events, aided by the military in any casual encounter, is sure to be effectual; but in these distant dependencies, the state of things is often just the opposite. There is a vast preponderance of force, perhaps, on the side of insurrection, and the consciousness of this gives boldness and confidence to the bad, and discourages the good; so that, unless they are allowed to use all the promptness and energy of military action, they are certain to be lost. They are a small force surrounded on all sides by an overwhelming force, and they have no safety but in most decided measures, which can only be taken under martial law. Their salvation, therefore, depends in this great power of the Crown to declare martial law.

This power of the Crown by the common law, is virtually implied and declared by the Petition of Right (*b*),

vast numbers of idle, dissolute men about the country, utterly ignorant and averse to honest industry, who had not yet learnt the uses of freedom, and found it easier to rob than labour.

(*b*) Reciting that by the great charter and other the laws of the realm,

whereby it was in substance declared that commissions of martial law within the realm in time of peace were unconstitutional and illegal, and that no man should lose his life or liberty in time of peace but by the law of the land, which has since been repeated in every Mutiny Act from the Revolution to the present time, and implies that martial law may be declared in time of war, within the realm, or in our dominions out of the realm.

But this limitation of the power of the Crown only applied to the realm, where the power might thus safely be limited, and even within the realm the law still recognized, that there might be a state of war between the Crown and its subjects, by reason of armed rebellion of subjects against the Crown, which would be levying war against it, and an act of treason. And that levying of war which would be a capital crime upon legal prosecution, might by law justify the declaration of martial law necessary for its suppression (*a*).

no man ought to be judged to death but by the laws established by customs of the realm or by acts of parliament, and that commissions had issued to proceed within the law, according to the justice of martial law, against soldiers or dissolute persons who should commit any felony, mutiny, or other outrage, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and execution of such offenders, according to the law martial, by pretext of which they have been put to death, when by the law of the land they might, and by no other ought to have been judged and executed, and enacting that hereafter no commissions of the like nature may issue forth to any persons whatever to be executed as aforesaid, lest by colour of them any be put to death contrary to the laws of the realm. Hale's view of the meaning of this is, that martial law is not permitted in time of peace, and that is the view embodied in the recital in every Mutiny Act since the Revolution, and affirmed by Hallam, vol. i. p. 240.

(*a*) See the chapters in Hale and Hawkins (Pleas of the Crown), upon the subject of high treason. This subject has not, unhappily, even in England, become quite obsolete, and even in our own time we have seen cases of high treason, by levying war against the Crown, as in the case of Frost and others, some years ago, in Wales. And in a country adjacent to this, in which the common law is the same as in England, we have seen quite recently a state of widespread disaffection and preparation for rebellion, calling for the suspension of the *Habeas Corpus Act*, and for preparations for martial law

That a levying of war of subjects against the Crown, whether within or without the realm, justifies the declaration of war on the part of the Crown against them, is quite clear, upon our common law authorities, and it is equally clear that what is a levying of war against the Crown is entirely a question of fact, though upon certain legal principles laid down by the common law, to be decided by the supreme authority at the time upon the circumstances as appearing to them to the best of their judgment; the great tests, however, being, numbers arming and drilling (*a*).

It is clear law (*b*), that the raising of an armed force

which no doubt would have been proclaimed upon the first rise. See the masterly charge of Mr. J. Keogh to the grand jury of Dublin on the occasion of the special commission for the trial of the rebels, in which he laid it down that any levying of war against the Crown, that is, rising in armed force against its authority, however weak the attempt, is an act of high treason.

(*a*) "What shall be said a levying of war is in truth a question of fact, and requires many circumstances to give it that denomination, which may be difficult to enumerate or define, and commonly it is formed by the words *more guerrino arrati*, arrayed after the manner of war. As where people are assembled in great numbers armed with weapons of peace or weapons of war; if they march thus armed in a body; if they have chosen commanders or officers; if they want *cum vexillis explicatis* (with banners displayed), or with drums or trumpets, or the like; whether the greatness of their number and their continuance together during those acts may not amount to an army after the manner of war may be considerable." All these circumstances will be found to have been combined with Jamaica case, 1865, vide post. "But a bare conspiracy or consultation to levy a war and to provide weapons for the purpose, is not a levying of war, though it may be an act of treason. Again, the actual assembling of many rioters in great numbers to do unlawful acts, if it be not after the manner of war, or *inspecie belli*, as if they have no military arms, nor march or continue together in the posture of war, may make a great riot, yet it does not always amount to a levying of war." The extreme caution of the mode of definition here adopted clearly indicates a very large discretion in the authorities who are to decide the question, it being in its nature a question of fact.

(*b*) Hale cites from Anderson's reports the following very illustrative case. "Divers apprentices of London were committed to prison for riot and for seditious proclamations as to the price of victuals, &c., for which divers

against the office and authority of the Crown (or its representative in a colony, or dependency, or foreign dominion), with a view to enforce or exercise any acts of Government, whether or not coupled with acts of outrage by such armed force, is a levying of war against the Crown, within the strictest possible definition of it. This has been held over and over again.

In the consideration of the question what is a levying of war, even with reference to the offence of treason (*a*), in

others conspired to take them out of prison, to kill the mayor and burn his house, to break open the houses where arms were to be found, and thence to furnish themselves with weapons and arms for three hundred more: after which, divers of them devised seditious libels, moving others to take part with them in their movement and to assemble themselves, and accordingly divers assembled themselves and had a trumpet, &c., and in going towards the mayor's house they offered violence to those who resisted them, but slew no one. It was held that this was a levying of war, and an act of high treason, for which several of them were convicted and executed; and it was said by the judges that if any do intend to levy war for anything that the Queen by her justice ought or may do in government as Queen, that shall be declared a levying of war against her, and it is not material that they intended no ill to the person of the Queen, if intended against the office and authority. The result was, of course, that if the rebellion had been formidable enough to require it, martial law might have been declared. It is curious how the same cases are reproduced in history, and the insurrection in Jamaica in 1865 was in substance the same as that the first cited, although infinitely worse and more formidable, and accompanied by an actual massacre. Hundreds of men who had been skilled for months, were armed, partly with weapons taken from a police-station, arranged in something like military order, marched down upon a county court town, where the custos or lord-lieutenant was with several of the magistrates, and a body of volunteer troops attacked them and massacred most of them; and thus commenced a system of massacre, and burning, and plunder, which lasted several days, with the avowed object of slaying or expelling all the whites.

(*a*) Thus in the case cited by Hale, of the weavers in and about London, who assembled in several places within the metropolitan counties, to the number of several hundreds, and stormed several houses, and burnt engine looms, defying the magistrates and peace officers. He says, "It is true they had no warlike arms, but that was supplied by the number, and they had such weapons as a rabble could get, as staves, clubs, sledges, &c." Moreover, he calls it an insurrection, and states, that, during all the time of the tumult, little or nothing was done to suppress them, until the Lords of the Council were constrained at an extraordinary time to assemble, by

which the intentions of the rescue, the numbers of those engaged may be an important ingredient, even in the absence of arms or military array; but with reference to the declaration of martial law, as to which, necessarily, danger is the main consideration, of course the element of number becomes still more important, even apart from military arms or array.

The question being one of fact (*a*) dependent upon all the circumstances, although when it arises at common law on a charge of treason it is for the jury to determine it under the direction of the court; in a case of rebellion and the declaration of martial law, it is for the supreme authority—the Crown, by its ministers or representatives—to decide to the best of their judgment; and if they do so, wrongly, they cannot be criminally liable, because it is a question of judgment and an act of state. It being a question of fact (*b*)

whose direction and orders as well to the civil magistrates as the King's guards, they were at last quieted. Five of the judges, Hale says, held this to be not only the levying of war but an act of high treason, and Hale appears to have been of that opinion; he says, "In respect of the manner of the assembling, though they had no weapons or usages of war, yet their multitudes supplied that defect; being able to do by their multitude what a lesser number of armed men might scarce be able to effect by their arms." 144. Five of the judges doubted "whether the crime of treason had been committed, seeing that there were no arms nor confederacy to get arms nor military array, &c." And further, they doubted the generality of the object.

(*a*) It must be carefully borne in mind that when Hale and other lawyers treat of it, they are treating of it under the head of high treason, with a view to a trial for treason, upon strict legal proof, in which case, however, as it is a question of fact, it is for the jury, not the court. In the case of martial law, it is for the crown, by its ministers or representatives, to decide it on their judgment, and, as it is a question which depends on circumstances and the present aspect of affairs, it is not for others to review their judgments after the event, by the light of facts and circumstances afterwards disclosed; and, at all events, it is a general principle of law that an honest judgment, on a question of fact, by persons whose legal right and duty it is to decide it, can never be deemed criminal.

(*b*) Lord Hale lays down the general principle that war may be levied against the crown directly, as when it is against the forces of the crown, or constructively, as when it is to effect any general or unlawful object,

what is a levying of war, and a question which depends upon evidence and upon circumstances so various that it is impossible to define them particularly, it is necessarily a question for the exercise of judgment upon all the facts and circumstances of the case, bearing in mind that with reference to the present question, the legality of declaring martial law, turns, not so much on degree of guilt, as of danger, and the imminency of peril to the public peace and the inadequacy of the civil power, and of the means provided by the common law. All that can be done or said to guide such men in the resolution of questions of fact like this (*a*),

as to throw down all enclosures generally, as distinct from a mere private wrong or injury as a particular enclosure. "What shall be said in levying of war is partly a question of fact; for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war. For then every riot would be a treason; but it must be such an assembly as carries with it *speciem belli*, the appearance of war, as, if they made a march with banners, or if they are armed with military weapons, as swords, or guns, or pikes; and are so circumstanced that it may be reasonably concluded that they are in a posture of war, which circumstances are so various that it is hard to define them all particularly." And he goes on to state that an arraying in arms is absolutely enough to make an overt act of high treason, without actual warfare or fighting, or any actual homicide; and so of a getting of arms. "And the reason hereof seems to be, because when an assembly of people thus arm themselves, it is plain evidence that they mean to defend themselves, and make good their attempts by a military force, and to resist and subdue all power that shall be used to suppress them; and besides, the very use of weapons by such an assembly, without the King's licence, unless in some lawful and special cases, carries terror with it, and a presumption of warlike force." *Ibid.* 151. Constructive levying of war is not so much against the King's person as his Government. If men assemble in the manner of war to kill one of His Majesty's Privy Council, this is a levying of war against the King. *Ibid.* 153. And this seems to apply equally to the representatives of the King in his colonies and dependencies abroad.

(*a*) After laying down the general principle *ut supra*, Lord Hale proceeds to cite instances as illustrations, observing that particular instances will best illustrate the subject. Thus he mentions, as an instance of constructive levying of war, a rising for the purpose of enforcing an increase of wages (Pleas of Crown, vol. i, p. 132), or the raising an armed force to pull down enclosures generally—"If divers persons levy a force or multitude of men to pull down a particular enclosure, this is not levying of war, but a great riot; but if they levy war to pull down *all* enclosures, or to

is first to lay down general principles, next to supply some particular instances by way of example and illustration: and illustration often teaches better than abstract definition; but both must be combined to form a clear judgment on a question necessarily dependent upon circumstances. There can be no doubt, however, that an actual rebellion or insurrection is a levying of war. That the combination of men, with a view (*a*), by force, to effect a general change of government, or any general unlawful purpose whatever, even in a state of peace, amounts to a levying of war against the Crown, is clearly laid down by all authorities, and the theory of martial law is that if the ordinary means are inadequate to deal with this the Crown may choose to treat it as a state of war, and proclaim martial law, leaving it to be dealt with under military power.

expel strangers, or raise wages, this is a levying of war against the King, because it is generally against the King's laws, and the offenders take upon themselves the reformation, which subjects, by gathering power, ought not to do" (*Ibid*, 137); so of a design to break prisons or deliver persons out of prison *generally* (*Ibid*). It must be borne in view that throughout Lord Hale has in his mind rather the common law offence of high treason, and is therefore disposed to be very strict in his views of what would be a levying of war to make that crime; but he says distinctly that an actual rebellion or insurrection is a levying of war (*Ibid* 145).

(*a*) Wherever the intention of an unlawful assembly is to redress public grievances, as to pull down *all* enclosures in general, or to remove evil counsellors from the King, &c., if they attempt with force to execute such their intentions, they are in the eye of the law guilty of levying war against the Crown (Hawkins' Pleas Crown B. 1 ch. 65, s. 6; ch. 17, s. 2). In many cases those who, in a violent manner withstand the lawful authority of the Crown, or endeavour to reform his government, are said to levy war against him. And therefore those who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the Sovereign, although they have no direct design against him, because they would both invade his prerogative by attempting to do that by private authority which he by public justice ought to do, which manifestly leads to rebellion, as where great numbers attempt by force to revenge themselves *against a magistrate for executing his office*, or to remove all enclosures, &c. But where a number of men rise to remove a grievance to their private interest, as to pull down a particular enclosure, they are only rioters (*Ibid*).

It is to be observed (*a*) that the levying of war by subjects against their sovereign or the state, may be without or before any actual hostilities or acts of outrage or rebellion; for the offence, as an overt act of high treason, in point of strict law, and legal proof, is completed by the arming and arraying, with the unlawful object of hostility to the government. What constitutes a state of rebellion or civil war, rests in the judgment of the sovereign or supreme authority.

As a state of war (*b*) may be between two kingdoms

(*a*) Thus Lord Hale, in describing the nature of the charge in indictments for high treason, states the several expressions he has seen, "arrayed after the manner of war, and sometimes other expressions being added, as the facts would bear, as with banners, with arms offensive and defensive, with trumpets;" without saying that any actual hostilities took place, &c., and he adds that though it be a question of fact whether war be levied or conspired to be levied, which depends upon the evidence, and that though some overt act must be stated in the indictment for treason, yet this is usually only "arrayed in the manner of war," or armed, or conspiring to get arms, and it is not necessary, even in indictments for high treason, to state that there were any actual hostilities; or any acts of felonious outrage; nor any actual violence or use of arms, and he cites a case already alluded to, where men were convicted of treasonable conspiracy to levy war, for putting down enclosures, because they conspired to get arms, in order to arm themselves for the object.

(*b*) Thus Hale, treating of the acts of treason committed by adhering to the King's enemies, which, as regards persons, is limited, by statute, to foreign enemies or invaders, says, "If *de facto* a war be *actually* between two states, they are in a state of war without any declaration, and if a foreign power violates the peace, and becomes an aggressor, though without any declaration, the person that is upon his defence is not bound to make a declaration of war, which is only necessary on the part of the aggressor; and if there be great provisions of hostility or the like, then the declaration is not requisite even in the aggressor, but supreme sovereigns take themselves to be judges of private injuries, and the manner, means, and seasons for their reparation; and therefore if *de facto* there be a war between princes, they and their subjects are in a state of hostility, and they are in the condition of enemies to each other. And he goes on to say that war is of two kinds; solemnly declared and not solemnly declared, or where two countries slip suddenly into a war without any ceremony. Pleas and the Crown. vol. i. p. 162-163. As he mentions that preparations for hostilities make a state of war, without any formal declaration of it; by analogy it is, between sovereigns and their subjects, if the necessity, as a

without either any actual hostilities on the one hand, or without any solemn proclamation or declaration of it; so, on the other hand, there may be a state of war previous to actual hostilities, by reason of the declaration of the state of war by one power against the other; and so as between the crown and its subjects in a state of rebellion, it is the declaration of it, as well as actual rebellion, which makes the state of war, and preparations for war or rebellion may constitute a state of war or rebellion.

But, as there may be levying of war without actual hostilities, so the state of rebellion (*a*) which justifies martial law may well exist, without that actual levying of war which would support in strict law an indictment for treason; because there may be a conspiracy or confederacy to levy war, either without or before the actual levying of war, just as the levying of war must precede actual rebellion, so the conspiracy must generally precede the levying of war; and, if the confederacy be so formidable that, if allowed to come to a head, it may be fatal, it may justify the declaration of a state of rebellion, and that is the declaration of martial law.

In this country (*b*), as the Petition of Right prohibits

matter of military exigency, or state policy, appears to require it for the sake of the public weal. War may be levied without fighting. 2 Salk. 635.

(*a*) A conspiracy or confederacy to levy war, or that is to do such an act, which, if it were completed and attained its end, would be an actual levying of war, is not a levying of war within the statute of treason. (Hale's Pleas Crown. vol. i. p. 148.) But it may be an act of treason in another way, if accompanied with an overt act endeavouring to or conspiring to get arms unlawfully (by breaking into houses, &c.), for the purpose of levying war or raising a rebellion, and so of meeting and consulting for the effecting of it, &c. *Ibid.* And, as these preparations for rebellion themselves indicate a state of rebellion, previous to actual rebellion, and if the confederacy is so likely to spread, and, if it becomes general, will be formidable, perhaps fatal, it is obvious that it would be absurd to wait until it became irresistible before taking the severe step of declaring martial law, supposing the danger required it.

(*b*) That is, England, the realm, meaning this country alone, within the four seas, according to the legal phrase. It is to that alone the Petition of Right relates, which declares that martial law shall not be proclaimed

martial law in time of peace, there must be a state of war to justify its declaration; and though, as the law of treason shows, there may be civil war by an armed rebellion of subjects against the crown, probably to make a case for martial law *within the realm* or in England, there must at least be an actual levying of war in rebellion, if not actual hostilities.

In this country, it is true, the imminency of public peril, which will justify martial law, even short of actual rebellion, is not likely to occur (*a*), but there is a country, forming part of our dominions, where the necessity for it has arisen within living memory, and there are many distant colonies and dependencies to which the Petition of Right does not extend, and in which there is a small white population in the midst of an enormous native population. There the state of things may be very different indeed, and the suppression of a conspiracy, which threatens to be fatal, may be the only chance of safety, and that may only be possible by martial law.

The power or perogative (*b*) vested in the crown of declar-

within the realm in time of peace, which implies that it may be, here, in time of war, civil or foreign, and that it may be out of the realm, in Ireland or in any colony or dependency, if there is a case for it by the common law, or any local law, statutable or otherwise (as there may be, by some imminency of public peril, through a conspiracy to levy war or raise a rebellion,) although there is no actual rebellion or levying of war.

(*a*) Because the civil and military powers combined, are always adequate to repress any rebellious or riotous movements, and in this country such movements are less likely to be rebellious than merely riotous. But in 1798, there was a dangerous and sanguinary rebellion in Ireland, and in 1848 and 1865 there were preparations for, and anticipation of, widespread insurrections. In Hayti, it is a matter of history, that the negro part of the population, not much more than half a century ago, committed a ruthless massacre of the whites (*vide* Pinkerton's Geo. vol i.), and in Jamaica in 1832 there was a negro rebellion, in which the white population were placed in terrible jeopardy. The recent rebellion in the same island, last year, in which there was a partial massacre, and evident attempts at a general and ruthless course of murder and plunder, is another illustration.

(*b*) The prerogative of the crown means that *special* power which the sovereign has; and which, though part of the common law is out of its or-

ing a state of war, and proclaiming martial law, is based upon necessity, and that necessity has more to do with imminency of danger and inadequacy of force, than with the actual degree of legal guilt assumed; and, it is manifest that there may be infinitely more peril in a widespread conspiracy or confederacy to cause a rebellion, which, if it once arises, it would probably be fatal, and an actual rebellion by so small a proportion, of the population as to be comparatively hopeless, and capable of suppression, even by the ordinary force.

The necessity for martial law which justifies the exercise of the prerogative in declaring martial law, must depend mainly upon considerations of public policy and military exigencies—comparing the apparent or apprehended extent of the danger with the adequacy of the means to prepare for, avert, or meet it. And this latter consideration must a good deal depend upon the means allowed the common law for the purpose (*a*), and upon

dinary course (Blackstone's Comment. by Stephen, v. i. p. 494.), hence it follows that it must in its nature be *singular and exceptional.* And hence Finch lays it down that the prerogative is that law, in case of the king, which is no law in the case of the subject. *Ibid.* Hence the power of declaring martial law must mean the power of declaring a state of things in which that may be done by subjects, under that authority, which cannot be done at common law, and hence it must mean far more than the mere suppression of actual rebellion, because for that, all the subjects of the realm have full power, without any special authority. In the execution of the royal prerogative which the law has given the sovereign is absolute (*Ibid* 506).

(*a*) It is obvious, that the only way to understand martial law, or the necessity for declaring it, in apprehension of an insurrection, is to consider the means of meeting it at the disposal of the authorities, which are of two kinds, legal and physical. By legal means are meant legal powers, whether of arrest, prosecution, resistance, or suppression; by physical, are meant the amount of force actually at command to enforce and exercise these legal powers. Martial law must mean something more than common law allows, and the first question, therefore, which lies at the basis of the subject is, what are the legal powers or means which the common law allows to be used, with a view to meet or avert a menaced or actual insurrection. That of course is a question of law: the other, the actual means and remedies, is one of military policy or judgment.

the amount of force, civil or military, at the command of the authorities.

It must not be supposed that, at all events *out* of the realm, martial law can not be legally proclaimed, except where there has been an actual levying of war against the Crown (*a*), for it is levelled at a state of rebellion.

Wherever there is an actual levying of war against the Crown, the re*may* be a declaration of martial law, supposing there is any need of it, as there may *not* be, for the rebellion may be trivial and easily dealt with. On the other hand, there may be a case for it even in preparations for a rebellion, and the imminent peril of one so formidable, that if it breaks out it must be fatal.

It is the state of hostility (*b*) which leads to actual insurrection with which martial law deals, and with which it deals, in order to prevent actual insurrection, by means of summary severity of military rule. It is the special remedy where there is reason to believe that the disaffected part of the population is in a state of rebellion, and preparing for actual insurrection, and is so numerous and formidable that if they once rise *en masse* the result must be fatal.

(*a*) The Crown, as against a foreign power, may declare war, because it finds that the enemy engaged in active preparations for war; and so, as against a domestic enemy, if a large part of the population are arming and drilling evidently for the purpose of a rebellion, which if it once breaks out may be formidable, if not fatal. It is *mercy* to the disloyal, and not less than to the loyal, to proclaim martial law at once, and put a stop to a state of rebellion which does not the less exist because it is latent, and not yet displayed in overt acts of felonious outrage. Surely prevention is better than retaliation or punishment?

(*b*) In the language of the Irish Act, the spread of disaffection, showing itself by some acts of rebellion, which are chiefly important as showing the danger that exists of that spirit spreading and diffusing itself through the whole mass of the population. In many of our colonies and distant dependencies, if it ever comes to that, there is no hope: all is lost. The disproportion is so enormous between the native population and the white, that if the former are allowed to rise *en masse* the whites must surely be annihilated. Under such circumstances, what remedy is there but the suppression of this spirit of rebellion by the stern and summary severity of martial law?

It lies at the basis of the whole question to consider that the scope of martial law is a *state* of rebellion or of war against the Crown (*a*), rather than mere resistance to rebellion, which requires no special authority at all. Where a large part of the population are arming and drilling, evidently for the *purpose* of insurrection, there is as much a state of rebellion as if the insurrection had broken out.

The more the subject is considered, the more it will be found that the propriety of the declaration of martial law, as well as for its execution or operation, and the means and measures taken, must be matters of military exigency (*b*), applicable not only to an actual levying of war, but to a state of rebellion. The necessity for it can hardly arise, except when from circumstances there is imminent danger of the disaffected class greatly outnumbering the rest, and the position of the smaller body in presence of that peril must be a matter of military exigency.

In considering the scope and nature of any special or *peculiar* law, it is necessary to consider the nature of the *common* law (*c*), in the class of cases comprised within the

(*a*) This, in fact, is the true meaning of declaring or proclaiming martial law. It is the declaration of a state of war or rebellion, for, as Lord Hale says, it is no law at all. It is a state of war not yet proclaimed. Every one knows a state a war may exist before actual hostilities, and indeed necessarily precedes them. Between two independent parties, when war is "declared" before actual hostilities on either side, then the war dates from that declaration not from the first engagement. A state of war is a state of armed hostility and that state may exist between the Crown and part of its subjects before actual rebellion. The great object of martial law is prevention.

(*b*) The question, what amounts to an actual levying of war against the Crown, when it arises as an overt act of high treason, is a question of fact though it may be one of strict legal proof. In a case of martial law, it is not a question of absolute *fact*, which requires strict legal proof, but rather of *judgment*, upon such information, and means of judgment, as may be obtainable. The distinction is vital to the whole question. Where there is actual levying of war, it is beyond a doubt that martial law may be proclaimed, supposing there is any doubt as to the sufficiency of the civil force. But it may be that there is no actual levying of war, and yet that there may be a state of rebellion against the Crown.

(*c*) This is the rule laid down by lawyers as to the construction o

peculiar law, so as to see the difficulties or *defects* of the common law in the class of cases under investigation, and thus to see the *objects* which the *peculiar* law would be supposed to have in view, in order to remedy and supply its deficiences or difficulties with reference to its procedure, its provisions, or its penalties.

The common law (*a*), as has been already shown, makes ample provision for the suppression of *actual* riot or rebellion, or resistance of actual outrage, and allows of any measures necessary, however severe, even to the extent of the use of deadly weapons and putting to death of persons actually committing such outrages or engaged in a felonious riot; but then this involves the parties acting in very great peril, so that it is not safe to act, and practically

statutes. That is, to see what was the *common* law in the case supposed, so as to see what is the *mischief* that the statute is designed to meet; *i.e.*, some deficiency or difficulty in the common law in the cases provided for. And so as to any special or peculiar law, recognised by the common law; for the very reason that it *supplements*, so to speak, some defect in the common law in special or peculiar cases, the common law being for ordinary times and ordinary cases, the *peculiar* law for extraordinary times and cases. And this deficiency will be either in the provision for, or definition of offences, or in the manner of proof and mode of trial or procedure, or in the penalties awarded. In all these respects martial law differs entirely from common law, being based upon wholly opposite principles.

(*a*) As to how far offences of this natur. (riots, &c.) may be suppressed and punished by the common law, it seems clear that every sheriff and also every peace officer may and ought to do all that in them lies towards the suppression of a riot, and may command *all other persons* to assist them therein: and it is certain that any private person may lawfully do so; and private persons may arm themselves in order to suppress a riot, and may make use of arms in the suppression of it, if there be a necessity for their so doing. However, it seems *extremely hazardous* for private persons to proceed to these extremities, and it seems *no way safe* for them to go so far in common cases, lest, under the pretence of keeping the peace, they cause a more enormous breach of it, and therefore such violent methods seem only proper against *such riots in a war or rebellion*, for the *suppression of which* no remedies *can be too strong or severe*. (Hawkins' Pleas, Crown, ch. 65.) And however the Riot Act 1 George I. c. 5, making rioters felons, aids the common law, in this respect, it still leaves it utterly ineffective to deal with imminent peril of a *formidable* insurrection on the point of breaking out, and which if it once becomes general must be fatal.

the common law fails, in presence of a really formidable public peril, unless supported by a great military force.

The difficulty (*a*) which besets the exercise of the undoubted common law right and duty of suppressing *actual* riot, and the evils which result from the difficulty of the common law are well illustrated in the history of the riots which endangered London (*b*) in the last century, and have endangered Bristol and Birmingham in our own times. The exigency is the sudden break out of an insurrection among a numerous and formidable class, which cannot be suppressed by ordinary means and by the ordinary authorities; the great difficulty being, either the responsibility imposed by the *common* law on those who used military force; or, in a colony, the *want* of it.

The difficulty, at common law, was, that the magis-

(*a*) A reluctance, rather inexcusable than unaccountable, had enervated the arm of government, and prevented the due employment of the military during the progress of these disgraceful disturbances. The former slight attempts to restrain the rioters only served to make the magistracy ridiculous, and to impart to the mob the hardihood arising from impunity. A general supineness seemed to pervade every department, no specific orders were issued, and without them no justice of the peace would venture to exercise the authority confided to him by the Riot Act. The case of a Surrey magistrate, who was tried on a capital indictment for such an execution, and those who obeyed his order were prosecuted, was not forgotten. In this emergency, a Privy Council was convened, insurrection still prevailed: nor was anything decisive or effectual suggested. The Council had met, when the King anxiously demanded if no measure could be recommended? The Attorney-General answered that he knew but of one, that *of declaring the tumult rebellious*, and authorizing the military to act when necessity required. Although the magistrates did not attend, the King desired him to make out the order, which he did, and a proclamation was drawn up, and orders from the Adjutant-General's office issued accordingly. (Adolphus' Hist. Eng., vol. 3, p. 250.)

(*b*) Thus Mr. Adolphus states that the Lord Mayor might, with the slightest exertion, have arrested the tumult in its *infancy*, but then it was allowed, through the hesitation above alluded to, or caused by the sense of responsibility, to go to a dangerous height. The magistrates declared that no civil force could quell so large and tumultuous a mob, and they hesitated to authorize the military to act. The military, when at last ordered to act, as they actually were, not only attacked the mob when engaged in actually breaking into and burning houses, but when they were

tracy hesitated, at a great personal responsibility, to direct the military to act, and the military, without order from the highest authority, hesitated to act, except under the direction of the magistrates, because at common law, though a riot and rebellious assembly could be attacked by military force when engaged in felonious outrage, it was very perilous thus to attack a riotous mob not actually engaged: and thus at common law it is hazardous to attempt to meet the mischief in any way in which it could be effectually met, by attacking the people before they gained such a head, or had gone to such a pitch of violence; and the remedy, therefore, was under martial law, to treat *all* as rebels.

On that occasion (*a*) the law was clearly laid down by Lord Mansfield, who declared the rioters were guilty of treason, by levying war against the Crown, as well as guilty of felony, in burning houses, &c., from which it follows that martial law might have been proclaimed; and though he explained the true ground of the proclamation for calling out the military was, that every man might and ought to act to suppress a riot, or arrest and, if necessary, kill those engaged in felony or treason, it will be seen that much more than this may be necessary, and is involved in martial law, though there was that exercise of military force which is *included* in martial law.

merely assembled—for instance on Blackfriars Bridge, where they could hardly have been engaged in *felonious* violence. The official returns showed above 450 killed and wounded, and Mr. Adolphus says that this account was already defective, as many dead and wounded were removed by their friends.

(*a*) It is to be observed, however, that on that occasion there was not so much an *insurrection* with any general object, as a continuance of riotous and tumultuous assemblages and acts of outrage, with no definite or common objects; each band of rioters being sacking and burning for themselves, and totally indifferent whose property they rifled or destroyed, doing it more in the wantonness of lawlessness than with an object in view, as to extirpate a class, to subvert the existing order of things, to overawe the Government, or the like. Moreover, as is always likely to be the case in this country, there was an ample military force, and the rioters, after all, were not numerous. That, therefore, though an illustration of the exigency met by martial law in one phase of it, was its least formidable phase.

The scope of martial law is not merely the suppression of actual insurrection or resistance of outward acts of rebellion, for that, as it has been shown, may be effected *without* martial law, as on the occasion of the Lord George Gordon riots, where the military were called out and attacked the rioters in the streets, without the declaration of martial law, in accordance with the opinion of the highest authorities (*a*).

The scope of martial law, therefore, it is obvious, must be something different from the mere resistance of actual outrage, and the suppression of actual insurrection (*b*),

(*a*) Lord Mansfield on that occasion was careful to show that it was *not* martial law; though he also showed incidentally that martial law *might* have been proclaimed, because there was a levying of war, which amounted to high treason. But besides this, the insurgents, he said, were guilty of felony, by burning private property, demolishing houses, &c. This was the true ground of the proclamation for calling out the military. Every man might, and if required by a magistrate must, interfere to suppress a riot, much more to prevent acts of felony, treason, and rebellion. What an individual might do was lawful for any number of persons assembled for a lawful purpose. Constables were particularly charged to apprehend persons engaged in breaches of the peace, felony, or treason, and in case of resistance, to attack, wound, and even kill, those who continued to resist. A private man, seeing another commit an unlawful act, might apprehend the offender, and by force compel submission, not to the assailant but the law; and so might any number of men assembled or called together for the purpose. This doctrine he stated to be the true foundation for calling in the military to assist in quelling the late riots. Consequently, he said, the metropolis was not under martial law. (Adolphus' History of England, vol. 3. p. 284.) The resistance and suppression, therefore, of actual riot or felonious outrage is not martial law, and does not require it.

(*b*) There are things infinitely more dangerous than mere actual tumult, or acts of outrage. These may be without concert or confederacy—without premeditation or preparation. The mere case of aggregation of rioters, with no common intent other than the instinct of plunder and lawlessness, acting for no definite end, and sustained by no strong feeling of sympathy, no common bond of union, is very easily dealt with, in the midst of a large and loyal community. But very different is the condition of a minority, especially of a small minority, of the population, in the midst of a large and numerous disaffected class, bound together by some common bond of union—of race, of colour, or of creed—animated by the same feelings and sympathies, and perhaps by a common animosity to the smaller and weaker body, and moved by some tremendous passion or craving for some object, the possession of land, or something else, which requires the

which does not require martial law, but allows of any degree of armed force. The scope of martial law is rather danger than actual outbreak; it is prevention rather than resistance; it is anticipation of apprehended insurrection; it is the mode of dealing with a state of rebellion rather than its mere actual outbreak, although that state may be declared by some outward acts and outrages.

The common law, indeed (*a*), provided ample powers for the resistance of actual outrage, for it recognized the great natural right of self-defence, to the extent even of inflicting death, if necessary, to prevent the actual impending acts of felonious outrage; and this was aided by statute, which in the Riot Act (*b*) made mere persistence in riot felonious. But then this common law power was limited, as the right of self-defence is rigidly restricted, to the resistance of present or actually impending acts of felonious outrage.

Any person, whether soldier or citizen (*c*), may lawfully

expulsion or massacre of the smaller but wealthier class—there may be thus a bond of instinctive combination, even independently of any actual conspiracy, and laying the strongest foundation for it.

(*a*) Thus in 1801, Mr. Law, afterwards Lord Ellenborough, gave it as his opinion that any of Her Majesty's subjects may arm themselves and use ordinary means of force to suppress riot and disturbance, and the chief justice, Sir J. Mansfield, laid it down that a soldier is as much bound to prevent a felony as any other citizen. In 1780, the forgetting of this led to alarming results, and soldiers stood by with arms in their hands, and saw felonies committed, houses burned or pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise have prevented them. (Simmons on Court Martial. p. 538.)

(*b*) The Riot Act. 1 Geo. ch. ii. c. 5, provides that those who resist the proclamation or remain assembled in law afterwards shall be guilty of felony, otherwise mere rioting would only be a misdemeanour. The common law remains in full force, supposing the proclamation not read, and after it is read, and preventing its being read is felony.

(*c*) By the common law every private person may lawfully endeavour on his own authority, without any comment or sanction of a magistrate, to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop others whom he may see coming up from joining the rest. If the riot is dangerous, he may arm himself against evil doers (that is, to resist their attacks, not to assail

resist or disperse an illegal or riotous assemblage, and whatever is done by him honestly for that purpose will be justified by the law. But then that only applies, it is obvious, to the resistance or suppression of actual assemblages, and further, does not authorize the use of armed force or the infliction of death, unless in the resistance or arrest of *felons*.

The common law (*a*) not only gives the most ample power even to common magistrates, and all that are in authority, to suppress actual riot, but imposes upon them a very strict legal duty to do so, and renders them criminally liable if they do not do so, and authorizes any amount of force, even military force, necessary to effect the object; but, then, as it equally leaves them criminally liable if they kill any one not guilty of participation in the riot, their position is one of great difficulty.

them with deadly weapons unless they are in the act of felonious outrage); and if the occasion demands immediate action, it is the duty of every subject to act for himself in suppressing riotous and tumultuous assemblages. And he may be assured that whatever is done by him *honestly* in the execution of that object, will be justified by the common law. Nor is there any distinction in this respect between soldiers and private individuals. (Lord Chief Justice Tindal cited Simmons on Court Martial, 550.)

(*a*) Any riotous or unlawful assembly may be thus suppressed, and in the absence of any definition of what shall be a riot within the meaning of that enactment, the common law definition of a riot must be resorted to; and in such case, if any one of Her Majesty's subjects be terrified, this is a cause of terror and alarm to substantiate that part of the charge (*Rex.* v. *Langford*, 1 Car. & M. 602—Patteson.) And so held by the Judges. Any assembly of persons, attended with circumstances calculated to excite alarm, is an unlawful assembly. (*Reg.* v. *Neale*, 9 Car. & P. 431—Littledale.) It is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. (*Reg.* v. *Neale*, 9 Car. & P. 431—Littledale.) The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case. An unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly. *Ib.* A justice called upon to suppress a riot, is required

But at common law all that the magistrate can do is to suppress an actual riot, and to swearin special constables, upon representation on oath of an expected riot, to be ready so to resist the rioters; he can take no further measures by way of prevention; and although he may by law give fire-arms to those whom he thus calls in to assist in suppressing an actual riot, it is deemed imprudent to do so.

by law to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty. (*Rex.* v. *Pinney*, 3 B. & Adol. 946.) Nor will it be a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law. *Ib.* Magistrates are not criminally answerable for not having called out special constables, and compelled them to act, unless it be proved that information was laid before them, on oath of a riot, &c., having occurred or been expected. *Ib.* A magistrate is not chargeable with neglect of duty for not having called out the *posse comitatus* in case of a riot, if he has given the king's subjects reasonable and timely warning to come to his assistance. *Ib.* The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and all the king's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so (*Rex* v. *Pinney*, 5 C. & P. 254.—At bar in K. B.). Constables and even private individuals are justified in dispersing the offenders, and, if they cannot otherwise succeed in doing so, they may use force (*Rex* v. *Furzey*, 6 C. & P.—Gaselee & Parke). Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence, *Ib.* A meeting called "to adopt preparatory measures for holding a national convention" is an illegal meeting. *Ib.* It is not left to the choice or will of the subject, to attend or not, at the call of the magistrates, but every man is bound, when called upon, to yield a ready and zealous obedience to the call of the magistrate, and to do his utmost in assisting to suppress a tumultuous assemblage. (Littledale, J. re Neale. 9 C. and P. 441.) It has been held that private persons may arm themselves to suppress a riot, and it *seems* to follow that they may *make use* of arms if necessary; however, it *may be very hazardous* for private persons to proceed to this extreme, and such violent means seem only proper against such riots as savour of rebellion. (Russell on Crimes, 401.) And all this applies only to *actual* riot or rebellion.

From this it will be seen (*a*) that by the law of the land soldiers, as well as citizens, may assist in the suppression of riot, and may interfere without any warrant or authority of magistrates for the prevention of outrage, and may put to death persons in the *actual commission* of felony or burning houses, &c, if they are otherwise unable to restrain them. But then this applies only to the *actual commission* of felonies, and, moreover (*b*), the great difficulty at the common law is to *hit the precise* line between justification and excess.

So again, at common law—if it is possible to arrest those who are in apparent rebellion, they must be arrested and tried at common law, and it is neither lawful to kill them (unless absolutely necessary to prevent a present act of felony), nor summarily to punish them. But the process of common law is far too dilatory and too doubtful, by reason of the strict rules of procedure, and especially of proof, so that criminal prosecutions have little deterrent effect, and, at all events, none sufficiently *prompt* for a great public emergency. The rules of common law are all based upon the principle of providing every possible security for the accused; but in a state of rebellion the public safety is the paramount object, and those who, by engaging in rebellion or taking no active steps to suppress it, are answerable for it, cannot justly complain that they

(*a*) Simmons on Court Martial, p. 542.

(*b*) "On the one hand, if he exceeds his power and occasions death, or other injury, he is liable to be proceeded against by indictment for murder or manslaughter; and, on the other hand, if he neglects his duty and does not do enough, he is liable to be proceeded against as culpably neglectful of his duty. He is bound *to hit the exact line* between excess and doing what is different. There is only one precise line, and how difficult it is to hit it! Still, in point of law, he is bound to hit it." (Tindal, C. J.; Simmons on Court Martial, p. 544). That is, at common law. This shews the difficulty which is met by martial law, and met by it in this way; that as it is the suspension of the ordinary law of the land, the parties acting under it are relieved from the dilemma, and are not bound to "hit the exact line."

are deprived by martial law of the benefits of common law, which they have thus caused to be suspended.

That, in times of rebellion or civil commotion, there is an urgent necessity for some such summary power as is implied under martial law (*a*), is manifest from the very nature of the common law itself, especially with reference to political offences or offences against the government, such as sedition or rebellion, because it is extremely strict in its definitions of offences, and in its rules of proceeding, especially as to pleadings and proof, and is, moreover, exceedingly dilatory in its proceedings.

At common law the power of Governors or of Secretaries of State (*b*) is so strictly limited and restrained

(*a*) A summary power of arrest, which is not possessed by the government at common law, even in case of sedition or treason, without a sworn information of a specific offence, and which is virtually necessary for the suppression of rebellion, may, indeed, be conferred by and the mere suspension of the *Habeas Corpus Act*, and this remedy will probably always suffice for this country or Ireland; but it may be not only far from efficient, but worse than useless, in a colony or dependency (where, by the bye, the *Habeas Corpus Act* would not apply), for the mere arrest of ringleaders might only irritate and excite to insurrection, where a large native population were ripe for rebellion.

(*b*) It is only an exception to the general rule that a Secretary of State or Governor is allowed to issue a warrant to arrest even for treason or sedition, and he must do it upon a sworn information of sedition, or treason actually committed; or a seditious or treasonable conspiracy in existence, or some seditious or treasonable act, as, for instance, a seditious document *published*. He cannot even issue, on sworn information, a general warrant to search for such mischievous papers as there is reason to believe are about to be published, so to arrest the parties, and thus *prevent* the publication, even although the consequences of publication might be a dangerous insurrection. That is, he cannot do so at common law, and if he does do so he is liable legally. This was the point established in the celebrated case of general warrants (*Entick* v. *Lord Carrington*, 3 Wilson's Rep. 288), where it was laid down that all that can be done is to arrest a man for a seditious paper actually published, or some seditious or treasonable act already done. But then the mischief may be done. The very argument was then urged, that it is better for the government and the public to seize the seditious paper before it is published; but it was said by the court that at common law it could not be done, but would require (*i. e.* in time of peace) an Act of Parliament. Under martial law, of course, it could be done, and the preparing it or concealing it would be capital offences.

by the necessity for making out a strictly legal justification for their acts, that they can do but little to protect the public and prevent mischief, as they must wait not only until some criminal act is done, but until they can get sworn proof and strictly legal evidence of it; and thus, though a Governor or Secretary of State may at common law arrest for treason or sedition, he can only do so, apart from special or statutable power, on sworn information that it has actually been committed, and cannot even issue general warrants to search for seditious papers, and take up any person in whose possession they are found.

Even an Act to suspend the *Habeas Corpus Act*, though it may enable the Crown to take up and detain persons on suspicion of treason or sedition, does no more (*a*); and although in *some* circumstances that might be sufficient to paralyze a conspiracy and *prevent* a rebellion, in other circumstances it might simply *precipitate* it and exasperate a great part of the population into a sanguinary insurrection.

When a criminal prosecution is commenced (*b*) the com-

(*a*) It would entirely depend upon circumstances whether this measure might be salutary or sanguinary. If the rebellious spirit were not diffused over a large and concentrated mass of the population, and the outbreak depended upon plans and leaders, the arrest of the leaders would paralyse the conspiracy and prevent a rebellion, as in the case of the Fenian conspiracy in Ireland in 1865. But if the case is the far more dangerous case of a widespread feeling of disaffection and spirit of insurrection, diffused through a *dense* mass of the population, united by sympathies of caste, of class, of colour, or of creed, as is likely to be the case in a foreign dependency, the arrest of a ringleader might be the spark to *kindle* an insurrection.

(*b*) The fundamental maxim of the common law, especially in criminal cases, is, that a man can only be convicted *secundum allegata et probata*, and that is the utmost strictness in stating the charge, and in *proving it* by strict legal evidence. The maxims of the law are, that "it is for the prosecution to make out his case," that the "prisoner is entitled to the benefit of any doubt," and that "it is better that twelve guilty men should escape than one innocent man should suffer" (Hale's Pleas Crown). This is all right enough in ordinary trials, but in cases of public peril or emergency the *contrary* is the case; there, the security of the individual

mon law, every possible obstacle is interposed in its way by the strict rules of pleading, and of jury, and of trial; all the maxims of the common law are in favour of the accused; he must be convicted of some *specific* offence, by the *strict* rules of *legal* proof, and by the *unanimous* verdict of twelve men.

The common law (*a*), being based upon the theory of peace and tranquillity, and the supremacy of the law, and being provided for ordinary times and ordinary circumstances, makes no provisions (beyond recognizing the natural right of self-defence) for extraordinary times and circumstances, when, *de facto*, the civil power and the superiority of law are in abeyance, and all its rules are framed for the purpose of providing every possible security for the subject who is prosecuted or accused, so that he cannot even be arrested without a sworn charge of a specific offence, and not upon general suspicion, however well warranted.

The common law indeed (*b*) admits the theory of proba-

must give way to the *safety* of the state. In cases of impressment, for instance, the most cruel and arbitrary course is allowed by law, on the ground of public necessity.

(*a*) Thus, in order to warrant the arrest of a man upon a charge of treason or sedition, there must be a sworn information of some acts of sedition or treason; and even a Secretary of State, though he may issue warrants in cases of treason or sedition, cannot even on a sworn information issue a general warrant to search for treasonable or seditious papers, and to arrest those in whose possession they are found. This was decided differently, indeed, at different times of our legal history, but this is the latest and present state of the law. (See *Entick* v. *Lord Carrington*, 2 Wils. reports, 275, and *vide* Amos on Constitutional Law, book i.) To authorize such measures of precaution or prevention, there must be an act of parliament to suspend the *Habeas Corpus Act*.

(*b*) As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on the one side or the other. (Lord Mansfield, in the Douglas case, cited in 4 B. & Ald., 122.) In the highest crime known to the law, treason, you act upon presumption; on proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the king. In highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty.

bility, in legal proof; but then it requires strict legal proof of the facts or circumstances whence the inferences of probability are to be drawn; and, next, there is no question upon which human opinions may so differ as upon the degree of weight, force, or effect to be given to circumstances as evidence, or as to the inferences to be drawn from facts and circumstances proved; so that, unless the proof happens to be overwhelming, it is difficult, especially in political offences, to get a conviction in a criminal case.

And not only must the crime be charged and proved with legal precision, but even after conviction; and though the guilt of the person is plain and clear, he may escape through some mere technical, or, at least, strictly legal objection, altogether beside the real rights of the case—a miscarriage of justice of little consequence in times of perfect peace, but perhaps pregnant with disastrous consequences in times of disturbance (*a*).

The offences (*b*) most dangerous to the public peace in a

unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, you presume the intent. *Ibid.* 123. Crimes of the highest nature, more especially cases of murder, are established upon presumptive evidence only, and the well-being and security of society must depend upon receiving of such evidence *Ibid.*, 140. Still it is required that the facts be clearly and conclusively proved, and by the best evidence.

(*a*) Thus, in the case of Horne Tooke, it was said by Lord Mansfield, "An indictment or information must charge what in law constitutes the crime with such certainty as must be proved, though that certainty may arise from necessary inference. *Whatever the degree of guilt may be*—however strongly it may be proved—yet if the defendant is entitled to a legal advantage, even from a *literal flaw*, God forbid that he should not have the benefit of it." (Re Horne, Cowper's rep. 675.) In that case, however, it turned out that the literal flaw was not enough, even on the strictest construction, to defeat the prosecution. And upon error to the House of Lords the decision was affirmed, but only because the indictment *sufficiently* adhered to technical rules.

(*b*) By the common law, the most atrocious seditious proclamations or publications, having a natural or indirect tendency to incite to felonious outrages, by inflaming the masses of the lower orders, are mere misdemeanours, and the process of prosecution by indictment or information is

period of disaffection or disturbance, sedition or conspiracy, being in ordinary times of no great mischief, are by the common law treated as mere misdemeanours, punishable only by fine and imprisonment; and, moreover, the proceedings are formal and dilatory, and often full of difficulty, so that terrible disasters might occur before an example could be made, and the law vindicated.

And it unfortunately happens (*a*) that the very offence which is most mischievous and formidable in times of public peril, that of conspiracy, is the most beset with legal and technical difficulty, insomuch as it is probably the most difficult offence, to lay and to prove, known to our law. This arises from the *secrecy* which, of course, attends any unlawful conspiracy, and attends it in the proportion of its diffusion, and therefore of its danger. It is hardly possible in such cases to have the requisite degree of legal precision in pleading and in proof.

And even in the case of high treason (*b*), the most for-

necessarily slow, and the punishment comparatively slight—perhaps a year's imprisonment—yet such a publication might lead to murder or to massacre; and, though the author is morally guilty of those crimes, he is not, according to the common law, legally guilty. By the common law, therefore, he can only be indicted for sedition, and sentenced to a fine and imprisonment, and this, long after the murder or massacre, unless, indeed, by strict legal proof, his seditious publication can be connected with the particular murder or massacre, so as to render him liable for it.

(*a*) It is true, that, on this very account, the law holds that in conspiracy the fact of conspiring need not be proved by express evidence, but may be collected from other circumstances (*King* v. *Parsons*, 1 Wm., Blackstone's Rep. 392); so it is of any other offence, which may be proved by circumstantial or presumptive evidence; but then this species of evidence opens the very widest door to difference of opinion among the jury, and greatly increases the chance of an acquittal. This kind of evidence, especially in political cases, hardly ever satisfies lawyers, and seldom satisfies twelve laymen. Either the lawyers or the laymen are pretty sure to pick a hole in it, and practically, as every lawyer knows, it the most difficult thing in the world to convict of a political conspiracy, or a conspiracy to excite to sedition or insurrection, for there is the question of *intention*; and even if the jury are satisfied of the fact, they may differ or doubt as to the *intention*, which is the most difficult to prove.

(*b*) Thus, in the case of Lord George Gordon, who was indicted for

midable and criminal species of conspiracy, by reason of the strictness of proof which is required, the prosecution is in our own time almost certain to fail, either on the point of the conspiracy or the intention.

There is also another defect in the law (*a*) as to the liability of parties not actually present at the time of the commission of a crime, of which they may be the real inciters. Though all who are *present*, aiding and abetting the commission of a felony, are guilty as principals (*b*), yet although an act be committed in pursuance of a previously preconcerted plan between the parties, those who are not *present* are only accessories; although in cases of murder they are equally liable to the capital penalty, yet then it must be shown that they previously procured or ordered the actual perpetrators to commit the particular outrage in question (*c*).

treason in levying war against the King. The case on the part of the prosecution was that the prisoner, by assembling a great multitude of people, and encouraging them to destroy the two houses of parliament, and commit different acts of violence, particularly burning Roman Catholic chapels, had endeavoured to compel the repeal of an act of parliament, although the Court (on a trial at bar), directed the jury that it was their unanimous opinion an attempt by intimidation and violence, to force the repeal of a law, was a levying war against against the King. and high treason; and although the intimidation was proved beyond a doubt, and the prisoner's actual presence and encouragement, and even direct words of incitement, "that the Scotch had no redress until they pulled down the mass-houses," yet, as the jury were directed, that if they were not fully satisfied they should acquit the prisoner, they did so. (*King* v. *Lord George Gordon*, 2 Douglas, 592.)

(*a*) *Rex.* v. *Gordon*, Leach, 515; *Rex.* v. *Lord Sanchar*, Coke, 189.

(*b*) *R. Howell*, 9 C. & P. 437; *R. Manners*, 2 C. & P. 801.

(*c*) *Vide* Foster's Crown Law, 125. It is not enough, therefore, at common law to prove that the prisoner *in fact* caused the murder or massacre, or the act of rebellion. It must be shown that he intended to do so. It is not enough to show that he actually incited to murder, or rebellion likely to lead to murder. It must appear, if he is indicted for the murder, or rebellion, or treason, that he incited to, or conspired to, effect the *particular* murder, or act of outrage or rebellion, for which he is indicted; and as this may not admit of proof, he may very likely escape at common law. In martial law he cannot, for two reasons: first, because the offence

There is indeed one case (*a*), that of high treason, in which the common law is more effective, for in treason all who are implicated are principals; and though a bare conspiracy to levy war is not treason unless it be actually levied, yet there may be a levying of war, although there is no actual fighting, and the measures taken for that end are all treasonable (*b*), and the conspiracy may be proved by the acts of the different prisoners, all in furtherance of the common design to levy war, that is, raising an insurrection for a general object (*c*).

All that can be done at common law (*d*), when war has actually been levied against the Crown, is to suppress actual insurrection, and to arrest and indict for high treason; and when war has not been actually levied (*e*),

of sedition, of which he can easily be convicted, is capital, and, next, because the strict legal rules of proof are not applicable, so that he may, possibly, be convicted of murder.

(*a*) 2 Hawkins' Pleas (Crown), B. 2, c. 29.

(*b*) 1 Hawkins' Pleas (Crown), B. 1, 117, 127.

(*c*) The meeting together and consulting the means to levy war or printing treasonable papers, as, that the people ought to take the government into their own hands, may be acts of treason. *Ibid.* To constitute the crime of levying war, there must be an insurrection, there must be force accompanying it, and it must be for a general object; and if a person is leader of an armed body, who enter a town and attack the military, this is that crime (*R. Frost*, 9 C. & P. 129), though it would be otherwise if it were only to release prisoners, &c. In a case of treason or conspiracy, the prosecution may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different conspirators, and so prove the conspiracy. *Ibid.*

(*d*) As in the case of Lord George Gordon, where, however, though the insurrection was suppressed by armed force, the man who incited it escaped on prosecution (*vide R.* v. *Gordon*, 2 Douglas).

(*e*) As in the case of Hunt, who assembled 60,000 people in military array, and with sticks and clubs, and with seditious ensigns, &c.; but as they did not *actually* commence insurrection, or commit any acts of outrage, all that could be done was to disperse them as rioters, and indict him and the other ringleaders as rioters (*The King* v. *Hunt*, 3 B. & Ald. 567). The millions there were loyal, and there were many more troops in the country, and the mob had no *arms*; but supposing it had been the other way, that there were few troops, and that there was general disaffection among the great body of the population, and acts of outrage showing

hough large numbers of people have been assembled, even in military array, with the most impending danger of actual insurrection, to disperse the assembly and arrest and indict for sedition. And though these means may be adequate where the great bulk of the community are loyal, as in this country, it is otherwise in our foreign dependencies, where the great body of the people are alien to us as a race, and may often be disaffected.

One great incident of common law is, that a party must be somehow *directly* connected by strict proof with the *particular* crime with which he is charged. It is not sufficient that he is fixed with it by fair inference, nor by legal evidence, with the intention of exciting some such acts; thus, although a man has published a seditious proclamation calculated to stir up sedition and rebellion, he cannot be fixed with a particular act of rebellion, unless his publication is connected with it (*a*).

So infirm is the common law in this respect (*b*) that even the administration by an associated body of men of an oath to any purpose purporting to bind him not to reveal or discover such unlawful confederation or conspiracy, nor any illegal act done by them, is at common law, at the utmost, even though the object is sedition, a mere

an impending insurrection; there, dispersion of the assembly could only have aggravated the evil, unless all attempts to get up insurrection were sternly suppressed by miltary measures, *i. e.* by martial law.

(*a*) It is indeed a clear legal principle, that a person who publishes that which is seditious, must be taken to have intended that which it is necessarily and obviously calculated to effect, unless he can shew the contrary, and the onus of proving the contrary is upon him (*R.* v. *Harvey*, 2 B. & C. 257). And as its contents were likely to excite sedition—that is, sodition in general—he must be presumed to have intended it; and so he may be convicted of a seditious publication (*R.* v. *Burdett*, 6 B. & Ald. 45), but not of any particular acts of rebellion or sedition, although it may be plain that those acts were in fact incited by his publications, unless it can be shewn that he intended those particular acts; and thus at common law the crafty and cunning criminal may escape, and the mere tools in murder or in massacre may alone be convicted.

(*b*) It is made felony in England by a statute, 37 Geo. 3, c. 123 (*R.* v. *March*, 13 East. 157).

misdemeanour, and it required a special statute (*a*) to make drilling criminal, without proof of an *intent* that the object is to stir up mutiny and sedition (*b*); and it is doubtful whether the preparation of a seditious publication is any offence at all (*c*), and, at all events, its publication is only a misdemeanour, and so (*d*) even of a conspiracy to excite discontent and disaffection.

And in the proof of the offence of conspiracy (*e*) there

(*a*) The 60 Geo. III., c. 3, under which a person can be indicted; first, for that he unlawfully was present and did attend a certain meeting and assembly dangerous to the peace and security of Her Majesty's liege subjects, and then and there prohibited by law, for the purpose of training and drilling to the practice of military exercises, movements and evolutions, divers persons, to wit, &c., and then and there did train and drill to the practice of military exercises, movements, and evolutions the said persons, without any lawful authority from Her Majesty or the Lieutenant, with the bad intent, the act of drilling would be criminal at common law, as an overt act of a treasonable and seditious conspiracy. (*Gogarty* v. *The Queen*, 3 Cox's Crim. Cas. 306.)

(*b*) *R.* v. *Hunt*, 3 B. & Ald. 566, *ibid* 444.

(*c*) *R.* v. *Burdett*, 4 B. & Ald. 314.

(*d*) *R.* v. *Burdett*, 5 B. & Ald. 95, *ibid* 717.

(*e*) Upon an indictment for conspiracy, general evidence of the conspiracy charged may be received in the first instance, although it cannot affect the particular defendant, unless afterwards brought home to him or to an agent employed by him (The Queen's Case, 2 B. & B. 312). On an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection:—Held, first, that resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the professed object of which meeting was to fix the meeting mentioned in the indictment, were admissible in evidence, to shew the intention of such defendant in assembling and attending the meeting in question, at which he also presided: secondly, that a copy of these resolutions, delivered by such defendant to a witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness had heard read from a written paper, is admissible without producing the original: thirdly, that large bodies of men having come to the latter meeting from a distance, marching in regular order, it was admissible in evidence to shew the character and intention of the meeting, that within two days of the same great numbers of men were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting, and that, on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a King's man again: fourthly, that

is, as is well known, the greatest possible difficulty, partly from the secrecy incident to conspiracy (unless an accomplice betrays his associates), and partly from the operation of the strict legal rules of proof; although, even by the strict rules of our common law, the conspiracy may be proved by circumstances, and then the acts and words of some of those implicated in furtherance of it may be evidence against others.

Thus even at common law (*a*), parties present at an unlawful assembly, with a common design to resist authority and commit a breach of the peace, at all events felonious, will be jointly guilty of a murder committed by some of them in the presence of the others, even although they did not actually intend it, *à fortiori* if they actually approved, and aided and abetted it. But the difficulty, at common law, is in proving the design against the ringleaders, who of course will take care to keep their connection with it secret, and the trial, at common law, will be dilatory, and require strict legal proof.

it was admissible in evidence, for the same purpose, to shew that another body of men, in their progress to the meeting, on passing the house of one of the persons who had been so ill-treated, expressed their disapprobation at his conduct by hissing, &c.: fifthly, parol evidence of inscriptions and devices on banners and flags displayed at a meeting, is admissible without producing the originals (*R.* v. *Hunt*, 3 B. & Ald. 566).

(*a*) Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. (*Reg.* v. *Howell*, 9 Car. & P. 437—Littledale.) If, in a case of feloniously demolishing a house by rioters, it appears that some of the prisoners set fire to the house itself, and that others were on the outside of the house, it will be for the jury to say, whether the latter were not encouraging and taking part in a general design of destroying the house and furniture; and, if so, the jury ought to convict them. (*Reg.* v. *Harris*, 1 Car. & M. 661—Tindal, Parke, and Rolfe.) If a house be demolished by rioters by means of fire, one of the rioters who is present while the fire is burning may be convicted for the felonious demolition, under stat. 7 & 8 Geo. IV., c. 30, s. 8, although he is not proved to have been present when the house was originally set on fire. (*Reg.* v. *Simpson*, 1 Car. & M. 669—Tindal, C. J.)

Again, even at common law (*a*), a person who influences others, with a view to incite them to acts of violence, may be liable for acts of outrage which they afterwards commit, if these acts can by circumstances be reasonably *connected* with the previous incitements, but not otherwise, even although it may be perfectly plain that they were the natural consequence of such incitements; and here again the difficulty will be in strict legal proof,—and even if it can be obtained, the trial will be too dilatory to secure the effect of a prompt deterrent example, which may be necessary to put down a dangerous rebellion.

These are some of the difficulties and deficiencies of the common law, with reference to the suppression of rebellion. This difficulty and deficiency of the common law is met by the prerogative of the Crown for the proclamation of martial law (*b*), the effect of which is to extend to all persons in the district proclaimed, and which is thus declared to be in a state of rebellion or of war,—not merely the regular authority of military law as exercised in peace, but also all that military power which is exercised towards an enemy or armed rebel in time of war.

(*a*) If persons are assembled together, to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected, in point of circumstances, with a subsequent riot, that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of the riot, although they are not present when it occurs. (*Reg.* v. *Sharpe*, 3 Cox's Crim. Cas. 288; 12 L. T. 537.—Wilde, C. J.)

(*b*) The military law, as exercised by the authority of parliament, and the Mutiny Act annually passed, together with the Articles of War, is not to be confounded with that different branch of the royal prerogative called martial law, which is only exercised in the emergency of invasion and insurrection or rebellion. (MacArthur on Court Martial, 1.) The authority of martial law, when it prevails in its full extent, claims jurisdiction in summary trials by court martial, *not only* over all military persons, but it extends to a great variety of cases not relating to the discipline of the army, but relating to *that state* which subsists by military power, as plots against the sovereign, intelligence to the enemy, and the like, which are all considered as within the cognizance of military authority. (*Ibid. et vide* judgment of Lord Loughborough. *Grant* v. *Gould*, 2 Hen. and Black-

Martial law (*a*) meets the emergency and removes the difficulty; because, being based upon necessity, its power is discretionary, and it allows of summary procedure, even to executions for any acts in *furtherance* of the rebellion, whether or not punishable, or capital, at common law, and thus, by terror of military executions, it checks and arrests the rebellion from breaking out into such acts as can be dealt with at common law.

The legislature have repeatedly (*b*) in our own time recognised the existence of this great power or prerogative in the Crown, and this not only indirectly by annual recital in the Mutiny Act, but directly, and expressly in statutes framed, either to prevent any liability as to the duration or existence of the state of rebellion, or to provide an ample and complete indemnity, or to provide for precautionary measures *without* the proclamation of martial law, or for the exercise of martial law, without waiting for any actual outbreak of rebellion, or continue it after all apparent danger.

stone's rep. 67.) "Martial law is totally different from that which is administered by courts martial (*i. e.* in ordinary times), but which bears an analogy to that which formerly existed in this kingdom, and has been exploded," that is, in time of peace. *Vide ante.*

(*a*) Offences cognizable under martial law are—intelligence with the enemy or rebel, concealing letters or messages from or relieving an enemy or rebel, mutinous assemblages, and seditious or mutinous words, concealing traitorous or mutinous designs, or not endeavouring to suppress them, or coming to the knowledge of any intended mutiny or rebellion without giving any notice thereof, &c. (*vide* MacArthur on Court Martial. vol. i.) Acts of this kind are capital by law martial, whereas by the common law they are mere misdemeanours, or not capital. Thus, for instance, although, by the law of England, if a man be adherent to the King's enemies in the realm or elsewhere, is made high treason, this must be by some overt act (4 Blackstone's Comm. vol. iv.); and by the common law, giving intelligence to, or relieving an enemy, is only considered to be in the same light with that of an enemy when in actual rebellion in the realm (*vide* MacArthur on Court Martial). The Petition of Right recognises the summary procedure by law martial, in time of war.

(*b*) As the 43 Geo. III., c. 117, the act (1803) for the suppression of rebellion in Ireland, reciting that a treasonable and rebellious spirit of insurrection then existed, which had broken out into open acts of rebellion,

Thus the act for the suppression of the Irish rebellion (*a*) authorized the Lord Lieutenant to put in force martial law in any part of the kingdom, without proclaiming martial law, and whether or not the courts were open, so that it might be doubtful whether martial law could be proclaimed; and it expressly recognised and preserved the power of the Crown, apart from statute, to proclaim martial law.

That act expressly recognised the right of the Crown in Ireland to proclaim martial law in case of rebellion, in any district covered by the rebellion, and was only designed to give power to *act* upon martial law in any part of the country where it was deemed necessary, whether or not it could there be lawfully proclaimed, and whether or not that part of the country was covered by the rebellion. And it plainly

and that the persons who might be guilty of acts of outrage in furtherance of such rebellion, who may be taken by the forces employed to suppress it, might avail themselves of the common course of law to evade punishment, and then enacted that it should be lawful for the Lord Lieutenant, from time to time, during the continuance of the rebellion—and whether the ordinary courts of justice should or should not be open—to issue orders to all officers of the army to take the most vigorous and effectual measures for suppressing the insurrection, in any part of the kingdom, which shall appear to be necessary for the public safety, and to pursue all persons acting, aiding, or in any way assisting in the rebellion, or attacking, &c., according to martial law, either by death or otherwise, and to arrest and detain all persons engaged in the rebellion or suspected thereof, and to cause them to be brought to trial before courts martial. So the 3 & 4 Wm. III. 4, declares that, nothing shall take away, abridge, or diminish the acknowledged prerogative of Her Majesty, for the public safety, to resort to the exercise of martial law against open enemies and traitors.

(*a*) This act provides that no act done, in pursuance of any orders so issued, should be questioned in any court of law; and to prevent any doubt which might arise, whether any act alleged to have been done in conformity with any order so issued, was so done, the Lord Lieutenant might declare such act to have been so done, which should be conclusive; and all officers or soldiers who shall act under such orders, shall be responsible for all things which shall be so done, to courts martial only, &c. All this, it is to be observed, was to be *without* proclamation of martial law, and whether or not martial law could legally be proclaimed; or, if it had been proclaimed, continued. And then there was this saving clause, that no-

implies that when martial law has been at common law lawfully proclaimed, it is an absolute indemnity for all that is really done under it by military orders, for it expressly gives such an indemnity for acts done under the statutable power of exercising martial law where it could not be exercised at common law (either because not declared, or because it could not be lawfully declared), and it would be absurd to suppose that the Legislature meant that there should be an indemnity in one case, and not in the other.

That subjects in a state of rebellion may levy war against the Crown, has been within the last few years declared by the Legislature in an Irish statute (*a*), which makes it felony or conspiracy so to levy war, without any *actual levying* of war; and, as the actual levying of war would beyond all doubt justify martial law even within the realm,

thing herein shall be construed to take away, or abridge, or diminish the undoubted prerogative of the Crown for the public safety, to resort to the exercise of martial law against open enemies or traitors, or any persons, to suppress treason or rebellion, so that this act affirmed the power of the Crown to proclaim martial law, and also declared what martial law involves.

(*a*) *The Crown and Government Security Act*, 11 & 12 Vict. c. 12.—The first section, after reciting portions of 36 Geo. III., c. 7, and 57 Geo. III., c. 6, repeals the same, except so much thereof as relates to the compassing the death of the sovereign. And then, by s. 3, it is enacted, "That if any person whatever, after the passing of this Act, shall, within the United Kingdom or without, compass, imagine, invent, or devise, or intend to deprive or depose our most Gracious Lady the Queen, her heirs or successors, from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or *to levy war against* Her Majesty, her heirs, or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassings, imaginings, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony."

so the conspiracy to do so, if widespread and formidable, might justify it out of the realm (*a*).

The latest (*b*) and most approved authors on the subject of military or martial law, declare that the power of the Crown to proclaim martial law, in case of rebellion, is not, even within the realm, limited by the Petition of Right, which does not, be it observed, apply *out* of the realm (*c*), and they lay it down broadly that the effect is to establish an absolute military authority over all persons.

The most constitutional writers (*d*) have affirmed the

(*a*) And under that Act it has been lately laid down (in the masterly charge by Mr. J. Keogh to the Grand Jury of Dublin, under the Special Commission for the trial of the Dublin rebels, 1865), that there may be a levying of war against the Crown, however weak, ill-arranged, and abortive the attempt may be.

(*b*) Courts martial formerly derived their authority exclusively from the Crown. A series of annual Mutiny Acts contained a special clause, which expressly provided that they should not abridge that branch of the Royal Prerogative; and so far as it might prevail beyond seas, an analogous distinction is still preserved in the terms in which the Mutiny Act declares that the Crown may grant commissions for the holding of courts martial within the United Kingdom, no mention being made of commissions granted to hold courts martial elsewhere out of the realm. But the Crown may grant commissions to Governors, &c., as *well abroad as at home*, to convene courts martial. And the Articles of War speak of courts martial out of the realm. (Simmons on Court Martial.) This power remains by the prerogative, as at common law, the Petition of Right only applying to a state of *peace within the realm*.

(*c*) The declaration of martial law renders all persons amenable to courts martial under the orders of military authority.—Simmons, 14. The Petition of Right indirectly recognizes the legality of resorting to it in times of war or intestine commotion. *Ibid.*

(*d*) "There may, indeed, be times of pressing danger when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel the temporary abandonment of constitutional power. It has been usual for all governments during an actual rebellion to proclaim martial law, or the suspension of civil jurisdiction. And this anomaly is very far from being less indispensable at such unhappy seasons, in countries where the ordinary mode of proceeding is by jury, than where the right of decision resides in the judge. But it is of high importance to watch with extreme jealousy the disposition towards which most governments are prone to introduce too soon, to extend

necessity for such an exercise of martial law in cases of sudden danger or extreme emergency, when there is apprehension of an imminent peril to the public peace or safety of the country, too sudden and too alarming to be met by the ordinary processes of the law, which are necessarily somewhat dilatory, and too powerful to be met by *ordinary* force, which is only provided for ordinary occasions.

This prerogative of the crown (*a*), not being at all affected by the Petition of Right, in case of a rebellion or insurrection, may be exercised even within the realm in such case; and as the Petition of Right does not extend to the foreign dominions of the Crown, the exercise of the prerogative by Governors, representatives of the Crown in colonies or dependencies where the English law prevails, is still less limited, and fully exists as at common law, apart from any statutable law.

In some colonies, however—among others, in Jamaica (*b*) —there are special statutes on the subject, which affirm

too far, to retain too long, so perilous a remedy" (1 Hallam's Const. Hist. c. 5, p. 240). With every respect to the eminent author, it is apprehended that this must have been written rather with reference to past times (at all events in this country), than to the present, for in our own age there certainly is no disposition on the part of governments to coerce the people. The same writer says, elsewhere, that, with the aid of our regular army, the government can, in no probable emergency, have much to apprehend from popular seditions. (Vol. iii. p. 263.)

(*a*) "The legality, or more properly the power, of the Crown, or the representatives to proclaim martial law, has been fully set forth in many statutes, which recognize the prerogative of the Crown to resort to the exercise of martial law against open enemies or traitors." (Simmons, p. 14, 5.) It is indirectly recognized in the Petition of Right; *i. e.* the legality of resorting to it in time of war, or intestine commotion.

(*b*) In the 33 Chas. II., cap. 31 (on the Jamaica Statute Book), passed in 1861. In the 7th section it is laid down, "That upon every apprehension and appearance of any public danger or invasion, the Commander-in-Chief do forthwith call a Council of War, and, with their advice and consent, cause and command the Articles of War to be proclaimed at Port Royal and St. Jago de la Vega, from which said publication the martial law is to be enforced; that then it shall, and may be lawful for

and extend the common law, and establish and extend the prerogative of the Crown, expressly in the clearest and strongest terms, confirming an absolute and discretionary power to exercise martial law as may be deemed expedient.

Where an absolute power is given in express enactments (as in the Irish or Colonial Acts alluded to), to declare, or to act upon and exercise martial law, when the Lord Lieutenant or Governor shall think it necessary to do so, and to take all such measures as they or the military authorities shall deem necessary or expedient, it is manifest that, for the honest exercise of this power, either in declaring, continuing, or exercising martial law, there can be no legal liability, and it seems to be the same at common law if all these statutes are only declaratory (*a*), as it is conceived they are.

the said Commander-in-Chief to command the persons of any of his Majesty's liege people, as also their negroes, horses, and cattle, for all such services as may be for the public defence, and to pull down houses, cut down timbers, command ships and boats, and generally to act and do, with all full power and authority, all such things as he and the said Council of War shall think necessary and expedient for His Majesty's service and defence of this island." And that provision has been continued by subsequent statutes down to the present time (*vide* 50 George III., cap. 17, sec. 73, and 74, and the 9 Vict. Jamaica stat.) In none of the subsequent acts is there any specific mode of proclaiming martial law, or any definition given, except in the statute of Charles. The Petition of Right is a statute relating to the realm of England, and did not apply to Jamaica, but if it did, this Act overrides it.

(*a*) The statutes referred to appear plainly to be only declaratory, and in aid of the common law power or prerogative of the Crown to proclaim martial law in case of rebellion, and therefore the immunity which is plainly implied in the absolute *discretionary* power, *i.e.*, an immunity on condition of honesty, equally applies to the exercise of the common law power, and the question is the same whether it regards the proclamation of martial law, or its duration, or its operation and execution. No doubt, when a man acts in execution of a strict legal duty, he must do so at his peril; honesty of intention is immaterial, and he must "hit the exact line," however difficult (*vide ante* p. 30. *in notis.*). But that is the very reason

Waiving the question (*a*), which is one of great moment, whether a Governor or Viceroy, representing the Crown, *can* be liable, civilly or criminally, for any act done in the exercise of royal authority, seeing that it is an act of State, it is manifest that he cannot be held liable criminally for the honest exercise of a lawful authority, in which he has to exercise his own judgment, provided he has exercised that judgment, however erroneously; for even a private individual, in acting in the suppression of rebellion, is protected, if he acts honestly.

why martial law is required, which is not limited by strict legal rule, but is from the beginning to the end of it a *discretionary* power. And it may be laid down undoubtedly, that there can be no culpability in the honest exercise of a discretionary power. "It is certain that no man ought to suffer, criminally, for an error in judgment (De Grey, C. J., *Miller* v. *Seares*, 2 Wm., Blackstone's rep. 1144); and although it is added, "it is equally just that he should make reparation, civilly, for the damage which other persons have suffered by such his error," that same liability which, in case of injury, short of death, would found an action, would in case of death, entail a criminal liability; and hence, in one of the cases on the subject, it was said, that if a flogging was illegal, and would support an action, then, if it caused death, it would support an indictment. And the Chief Justice goes on to hold the Commissioners liable in that case, on the ground that the act was illegal, and beyond their jurisdiction and legal power; and that was the ground on which the Secretary of State was held liable for issuing a warrant *wholly illegal*, one which he could not in any case issue (*Entick* v. *Carrington*, 2 Wils. rep. 275.) But the Secretary of State or Governor of a colony, acting in the exercise of a high executive power of State, higher than judicial power, can surely never be liable for an error in judgment, in declaring martial law, though in the opinion of others it was not necessary to do so. It has been held, lately, that a Secretary of State is not liable for advice to the Crown. (*Irwin* v. *Grey*, 3 Finlason's rep. 635, and see the author's notes to his report of the case of *Dichson* v. *Gen. Peel*, 3 Finlason's rep. 527.) A Governor is not liable for an act approved of by the Secretary of State, even though not within his general authority, as it then becomes an act of State (*Buron* v. *Denman*, 2 Exch. rep. 167). And if it is within his general authority, it is equally so before the approval.

(*a*) It seems clear that he is not so liable *while* he holds the office, nor afterwards, unless the act is *clearly illegal* or beyond his powers, as in the case of a Secretary of State issuing a general warrant, that is one which he could not even legally issue at law (*Entick* v. *Carrington*, 2 Wils. 275). It is otherwise where the act is one which under circumstances he might do, and as to

There is strong authority for saying that an act within the general power of a Governor or Minister of State is protected as an act of State.

It is a general principle of law (*a*) that those engaged in the administration of public justice are not allowed to be harassed by legal acts and prosecutions for their part in it, whether as judges, jurors, or officers; and if this is the case as to *ordinary* law *à mullo fortiori*, it is so as to *extraordinary* law, like law martial, which is only lawful upon some great emergency, and the execution of which is of course likely to expose those engaged in it to greater obloquy and odium, and involve them in greater peril if they were legally liable, which it is conceived they were not, unless they have acted maliciously.

Although, of course (*b*), if a general, or military officer,

the doing of which he has to exercise a *judgment*; and moreover, the honest exercise of a discretionary power is never criminal or legally culpable.

(*a*) "As the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal cases, it hath also freed the judges of all courts of record from all prosecutions whatever, except in the Parliament, for anything done by them openly in court as judges; for the authority of a government cannot be maintained, unless the greatest credit be given to those who are so highly entrusted with the administration of public justice, and it would be impossible for them to keep up in the people that submission to their judgments, without which it is impossible to execute the laws with vigour and success, if they should be continually exposed to prosecutions of those whose partiality to their own classes would induce to think themselves injured." (Hawkins' Pleas of Crown, B. 1. c. 72.) Even ordinary Justices of the Peace are not liable at law unless they act out of their jurisdiction, or maliciously. (*Vide* 6 B. & C. 626.)

(*b*) If the court-martial in time of peace put a man to death by martial law, both the judges and officers are guilty of murder; but where persons act by virtue of a commission, which if it were strictly regular would give them full authority, but happens to be defective only in some point of law, it seems that they are in no way criminal. (Hawkins' Pleas of Crown, B. 1. c. 72.) And so it would be according to ordinary legal analogies, if, martial law having been lawfully proclaimed, there were any irregularities committed in the manner of proceeding. There can be no doubt, and appears implied from the proclamation, that if, in time of rebellion, the Crown or its representative declared martial law, what was done under it, that is, under the orders of the military authorities, who put it in force, would not be criminal, nor in any way legally wrongful.

act upon or put in force martial law, when the state of war or rebellion does not exist, or has not lawfully been declared, he will be *legally* guilty of an illegal act, although it may even then be a case for an act of indemnity; yet if he has acted honestly, either in declaring martial law, or in carrying it out, according to military usage, he is not legally liable, whatever errors or irregularities there may have been.

That is, the law, it is conceived, is (*a*) not, of course, that a governor or military commander can arbitrarily, and without any honest or reasonable belief in its necessity, declare martial law, and then under it act as arbitrarily as he please with impunity, either as against persons not subject to it, or *in cases* not coming under it, or the like, but that, assuming that in the honest exercise of his judgment he declares martial law, in a state of things in which he might honestly and not unreasonably believe to be a case for it, then, for what is done under it, in accordance with military usage in such cases; or, on the other hand,

(*a*) Thus if a governor arrests or imprisons unlawfully or arbitrarily in time of peace, that is in a case where he has no power to arrest or imprison, he is liable to be sued, as a Secretary of State is, if he issues a warrant for arrest, except in cases of treason or sedition. (*Entick* v. *Lord Carrington*, 3 Wilson's reports, 288, the great case of general warrants.) So, if he imprisons in time of peace, he must show a legal justification. (*Way* v. *Gally*, 6 Mod. 195; Lord Bellamont's case, 2 Salk. Rep. 625.) So if he subjects to military discipline persons not *amenable* to it, as in the case of General Sabine, cited Cowper's report, 169; and so if he puts martial law in force as to persons or cases not coming under it, or acts on martial law without lawfully declaring it, or without its lawful existence. But it is otherwise if he lawfully proclaims martial law, and it is only put in force as to persons or places which come under it. Lord Mansfield truly says:—"To lay it down in an English court of justice, such a monstrous proposition as that a governor is accountable only to God and his own conscience, that he is absolutely despotic, and can spoil and plunder, and affect Her Majesty's subjects in their liberty or property, with impunity, is a doctrine that cannot be maintained." But that was spoken of a case in which the governor had virtually acted under martial law, where it did not exist, and there was no suggestion that it existed. The other passages in that celebrated judgment plainly imply that if it had lawfully existed it

done (without such authority), in excess of it, *he* is not legally liable.

The very cases (*a*) in which at common law governors or military authorities have been held legally liable for acts done by them in the exercise of their authority honestly, and with the best intentions, for the most praiseworthy objects, only serve to show the necessity for martial law on occasions of public emergency, on account of the infirmity of the common law in regard to such occasions, and also show that when martial law has been lawfully declared, the governor or military authority cannot be legally liable for what is honestly done, for otherwise there would be no difference between ordinary law and martial law.

would have been a justification for anything that could be done under it, and it was not material to consider whether an action *would lie at all.*'

(*a*) Such as were cited by Lord Mansfield in the judgment already quoted: "I remember an action brought against Capt. Gambier, who, by order of Admiral Boscawen, had pulled down the houses of some settlers, who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the Admiral, for the *health of the sailors was affected by frequenting* them. They were pulled down; the captain was inattentive enough to bring the settler over in his own ship, and as soon as he came here was advised to bring his action against the captain. He brought his action; and a thousand pounds damages given against Captain Gambier." (Cowper's rep. 101.) "I recollect another case which came before me, which was the case of Admiral Palliser; it was for destroying fishing huts upon the Labrador coast. After the treaty of Paris, the Canadians, early in the season, erected huts for fishing, and thus got an advantage by beginning earlier than the fishermen who came from England. It was a question upon the rights of the Canadians. However, the Admiral, from general principles of policy, ordered the huts to be destroyed. The action went on. *Ibid.* A similar instance occurred in the naval service of Lord Nelson, who was continually harassed by actions for some steps he took in the public service abroad. These are illustrations of the danger which governors or military authorities run in acting for the public welfare at common law, seeing that they must make out a strictly legal justification for their acts, which they hardly ever can. This is the difficulty to be met by martial law, but if the authorities have to convince a court of law that they were justified, they are not relieved from the difficulty.

It is manifest from these premises (*a*) that even if a governor who has lawfully declared martial law and directed certain acts to be done under it, can be liable legally at all, whether for acts justified by martial law or not, so if not done under his direct orders, at all events the lawful proclamation of martial law would be a full legal defence for any acts, justified by military usage, under martial law, however arbitrary.

The law on the subject is not at all affected by the statute (*b*), which provides that criminal proceedings may be taken in England against a person who has acted as governor, for acts done abroad during the period of his

(*a*) "I can conceive cases in time of war in which a governor would be justified though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege, or upon an invasion of the island, the governor should judge it proper to send an hundred of the inhabiants out of the island, from motives of real and general expediency; or, suppose upon a general suspicion, he should take up people as spies, upon proper circumstances, laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought according to the circumstances of the case." (See Lord Mansfield, C. J., *Mostyn* v. *Fabrigas*, Cowp. 173.) That is, as it is presumed, whether he had acted honestly in the exercise of his supreme military authority, for it could hardly be meant that a court of law could enter into questions of military strategy, especially as Lord Mansfield also says, "The court, if the nature of the case would have allowed of it, might have adjudged that the raising of a mutiny was a good ground for such a summary proceeding." *Ibid.*

(*b*) The 42 Geo. III. c. 85, reciting that whereas persons holding or exercising public employment out of Great Britain, often escape punishment for offences committed by them, for want of courts having sufficient jurisdiction, or by reason of their departing from the country or place where such offences have been committed; and such persons cannot be tried in Great Britain for the offences, as the law now stands, inasmuch as such offences cannot be said to have been committed in any county; and then enacting, that if any person who shall be employed in any civil, or military station, or office, out of Great Britain, or shall hold or exercise any public office, &c., shall commit or be guilty of any crime or offence in the execution of, or under colour of, or in the exercise of such office, &c., such crime may be prosecuted in the court of Queen's Bench in England, on information exhibited by the Attorney-General, or indictment, &c. The act assumes that the governor has been *guilty of a crime*, and *that* is left as it was. It only affects the *venue*.

government; for the scope of that statute is merely *procedure*; it assumes that there has been an offence punishable by law, and it leaves the law as to the criminality or criminal responsibility for the act just where it was, so that if it was not criminal in the colony, it will not be so here.

A Minister of State, or a governor, or viceroy, declaring a state of rebellion to be a state of war, and proclaiming martial law, exercises a high discretionary authority vested in him by the Crown to be exercised by him according to his judgment, for an error in which he may no doubt be liable to be censured by the Crown or by Parliament, but for which he cannot be criminally liable to an individual, unless, at all events, in the not very probable case of a proceeding wholly colourable and tyrannical (*a*).

The truth is, the subject of martial law cannot be granted unless it is regarded as, from first to last, a measure of military necessity. In war it is every thing to anticipate the enemy; and in government it is idle, and also cruel, to wait for an insurrection. (*b*) The moment it appears that

(*a*) See the judgment of Baron Parke, in the case of *Buron* v. *Denman*, 2 Exch. rep. 167, as to the immunity of an officer for an act adopted by the Government as an act of state, which of course implies immunity in the minister. See also the notes by the author to the report of the case of *Dickson* v. *Peel*, 3 Finlason's Nisi Prius cases, 635, where a similar view is maintained. In the recent case of *Luby* v. *Lord Wodehouse*, in Ireland, the court of Queen's Bench in Ireland summarily took off the file a declaration in an action against the Lord Lieutenant for having the plaintiff arrested under a warrant issued under the Treason Felony Act, but which virtually gives a qualified power of acting under martial law without proclaiming it,—the court holding that it was an act of State for which the Lord Lieutenant could not be sued. It would be disastrous if it were otherwise, and if a Lord Lieutenant or the Governor of a colony, who had proclaimed martial law in an honest belief of its necessity, were liable to be indicted for murder by the friends of those slain in rebellion. It would thus depend upon the opinion of a jury, thousands of miles away from the place, months or years after the event, when circumstances had altered and witnesses had died, and memory had failed or been tampered with by partisans—whether a Governor who had saved a colony from cruel massacre, should himself be convicted of murder.

(*b*) The arming and drilling of men in secret, under such circumstances as to show that it can only be against the Government, is a levying of war or

a large part of the population, too numerous to be dealt with by civil force, are arming and drilling, and thus preparing for rebellion, it is best to declare martial law at once, and crush the rebellion before it breaks out.

The matters (*a*) which have to be considered as elements of judgment, upon the question of the declaration of martial law, are far too large for the consideration of a jury. They embrace the character and condition of the disaffected part of the population; their preparations for rebellion; the signs and symptoms of the spread of a rebellious spirit; the strength of the military and police, the strategical capacity of the country, the conditions of warfare, &c.

The fundamental question (*b*) upon the consideration of

so near it, as fully to warrant the declaration of martial law, supposing that there are reasonable grounds for believing the disaffected part of the population so numerous that if the rebellion spread, it must be fatal. It would be idle to wait until it was too late. A smaller force must meet a larger by superior strategy and energy. There may be the state of war long before the actual outbreak of it; and the state of war is proved by hostile arming and drilling, at all events accompanied with any lawless acts, or defiance and resistance of the law, as in the Jamaica case.

(*a*) For example, in the recent remarkable instance of Jamaica, there was a large island with much mountain, and wood, and bush, difficult of access, and an enormous black peasant population, in their character singularly credulous and excitable,—about 400,000 to only 15,000 whites, with only 1,000 soldiers and scarce any police, with a strong and overwhelming passion among the blacks for the possession of land, favoured and influenced by popular agitation, &c. Then, for months there had been evident disaffection, secret arming and drilling, open acts of resistance and defiance of the law, and at last a terrible and cruel massacre.

(*b*) Nothing is more clear than that if there is no original authority, and the assumption of it is illegal, all those who act under it act illegally; although, it is also a well-known principle that if there is the original authority, then those who act under it, notwithstanding any mere irregularities in its execution, may be justified. The common instance of this is that of any court issuing its warrant or writ; in such case, if the court has jurisdiction, then the writ or warrant will justify the officer acting under it, for he can only go thereby; but it is otherwise if the court has *no jurisdiction*, then all are trespassers, and, in the case of a capital sentence,—may be murderers. (*Vide Carratt* v. *Morley*, 1 Q. B. rep. 18.) It is always, therefore, a fearfully vital question when life has been taken, whether there was original

a case of martial law is, the *legality* of the proclamation or declaration of it, which depends, it is conceived, simply upon the *fact* of its having been so declared; otherwise there could be no security for any one ever acting under martial law, for it is a general principle that if there is no *original* authority or jurisdiction, all who act under it act illegally, and so, if they take life (save in self defence, or in suppression or resistance of actual felonious outrage), are guilty of murder.

If the legality of martial law were made to depend (*a*) upon the soundness of the judgment exercised in declaring it, in the opinion of other persons, at a great distance, and after the event, and under different, perhaps hostile influences, it is obvious that no one could even venture to declare, or to act upon, martial law, and put in force its terrible powers for the salvation of a colony or a dependency.

Assuming, however, that martial law has been legally proclaimed, then there can be no doubt that its effect is to place all persons within the district under military government (*b*), which, as is well known, is purely arbitrary, and is

authority or jurisdiction; all important, for the sake of those who act under it, by the order of superior authority.

(*a*) The absurdity and incongruity of such a view is only the more apparent under the Act of 42 Geo. III. than it was before. For, prior to that act the governor would be sued, if at all, after being removed from office, in the colony, where people, at all events, would know the necessity for martial law, and probably be grateful to him for proclaiming it, and the governor is unlikely to declare it, unless in accordance with a general widespread feeling of necessity and apprehension. And now it is to be tried in England, thousands of miles away, with the witnesses at that great distance only to be examined on commission, without the benefit of *oral* evidence, and perhaps with the disadvantages of prejudice raised by partisans. Indeed, he would not be likely to be indicted here unless from prejudice.

(*b*) It is laid down in Simmons on Court Martial, that the effect of martial law is to render every person liable to be treated as a soldier, or rather as a rebel; for, in case of a rebellion, the population are *primâ facie* rebels. (*Vide* General Nelson's evidence, in the Jamaica case.) The effect of this is that the military code prevails as to offences, as to penalties, as to procedure, and not the common law. Thus, therefore,

guided only by military rule, military usage, and military authority, and this solves all questions arising as to the scope or extent of martial law, as to the persons or matters coming under it, or the measures adopted.

Assuming, however, that a minister or governor can be legally liable for declaring martial law (*a*), it is clear that the question can only be whether he really exercised an honest judgment upon such facts as might not unreasonably tend to the conclusion of its necessity. The difficulty, however, is that this might be a matter of military exigency, of which a jury could not judge, or of facts and circumstances of which there was an honest belief, but of which no strict legal proof could be given.

The proclamation of martial law, as it is a declaration of a state of war, based upon the existence or imminence of a rebellion, and the inadequacy of the force to meet it, must always, more or less, be a question not merely of policy, but of military exigency (*b*), and dependent upon a personal

under martial law persons are liable to be seized and shot for acts, no offences at all, or mere misdemeanours at common law, and may be so dealt with on suspicion without strict legal proof, which is only regarded at common law. It is a matter certainly of military discretion and military exigency. There is, therefore, no sort of analogy between martial law and ordinary law. (*Vide Johnstone* v. *Sutton*, 1 Term. rep. 545.)

(*a*) Which would involve of course the necessity for his being prepared to satisfy a jury of the reasonableness of his judgment, and to do so by *strict legal proof* of facts which would satisfy them of it, for only strict legal proof could be received on a legal trial. The result would be that a jury would have to determine a matter not only of political prudence, but military exigency, and that the governor would have to justify, by *strict legal proof*, a judgment which he had found to the best of his ability, upon information or belief of himself or others, and observations made, much, or most of which, he could not produce as legal evidence, much of it being personal observation, general belief, hearsay, rumour, &c., all of which would be legitimate elements of judgment, but would not be admissible in evidence.

(*b*) It must necessarily depend upon the size and extent of the colony, or dependency, or the district endangered, the character and condition of the population, and especially of that part of it deemed to be disaffected; the information gained as to the numbers and movements of the disaffected, which might be alarming, but vague, and *might* turn out to be exaggerated.

judgment, to be formed at the time, upon an emergency, on a sudden sense of responsibility, without much time or any leisure for reflection, upon hasty observation and hearsay information, and upon various matters more or less elements of judgment, but not admitting of legal proof, and also necessarily matters of opinion, on which one man's judgment might differ from another's.

All the reasons which apply against holding a commander-in-chief legally liable for carrying out military authority in time of war, equally apply in time of rebellion, when martial law has been declared, which is a discretionary military authority, and also apply *à fortiori* against making the governor liable for declaring it, for it is an an act done by him in the exercise of a high governmental function as representing the Crown, and seems to come under the denomination of an act of State (*a*).

The extent to which they were armed or organized (which again would be a matter on which there might be alarming, but uncertain information, and great difference of opinion), the character of their leaders and their ultimate intentions, the degree to which the disaffection was local or general, and, with reference to this important point, the degree to which it was mixed up with any fanatic or hostile feeling towards any other class of the population. Perhaps it was a rebellion of caste or colour, or creed, or otherwise of a character likely to diffuse itself in the signs and symptoms of impending insurrection. The number of the military and police, their capacity for dividing their forces, the probability of their being overwhelmed either by numbers in actual attack, or by the fatigue of constant watching, and so forth, a vast variety of circumstances, all resting more or less either upon uncertain information, or upon mere opinion and personal observation, little of which could be reproduced in *legal evidence.*

(*a*) It is a well settled principle that a party cannot have a remedy at law for an act of State (*Elphinstone* v. *Bedrechaud*, 1 Knapp, 316), that is, for an act which a Minister of the Crown had legal power to do. The remedy (such as it is), is only against the Crown (*Benson* v. *Denman*, 2 Exch. rep. 184). That was an action by a foreigner against Captain Denman for an act done under the orders of a governor of a colony, approved of by the Secretary of State. But the principle appears equally to apply to the acts of a governor as representing the Crown, and exercising a high prerogative of the Crown, provided he does so lawfully, though, indeed, if the prerogative is really exercised it must be done lawfully, for the prerogatives of the Crown are part of the common law of the land (*Vide* 2 Blackst. Comment.) Of course it would be otherwise if he acted colourably.

PART II.

THE NATURE AND POWERS OF MARTIAL LAW.

FROM these premises it will be manifest that the effect of the legal declaration of martial law (a), is to establish in the proclaimed district a state of war, and a species of rule, altogether different from, and opposite to, that of the common law, in every respect, whether as to offences, penalties, or manner of procedure, power of arrest, nature of proof, or mode of trial.

What may be done under martial law depends upon its real nature and character, and that, as has been shown, is neither more nor less than this, that is a declaration of war by the Crown, against the subjects, in consequence of a prior declaration of war by them against the Sovereign. This is the fundamental principle, and from this results the necessary consequence, which underlies the whole subject of the scope and effects of martial law, that it justifies the treatment of all that part of the population which is fit for fighting, except those who are actually engaged in putting

(a) This is the very reason why the Petition of Right prohibited it in time of peace, and why its exercise is regarded with such jealousy. If it were at all like the common law, there would be no reason for this; it is just because it is the opposite of the common law in every respect and utterly absolute in its character, that therefore the Constitution will not allow of it within the realm in time of peace. Thus Hale declares that it is no law at all. Thus the Petition of Right adverts to it as the power of summary execution by military law. It is, in fact, the establishment of military rule, which is necessarily in its nature arbitrary and absolute. So Blackstone's Martial Law is the law, whatever it may be which is imposed by military authority, vol 2, p. 502.

down the rebellion, *prima facie* as rebels ; that is, under suspicion of rebellion, whether or not they are found actively employed in support of the rebellion. *Prima facie* they are rebels, because they are in a district in a state of rebellion, and are not found acting against the rebellion. In rebellion, there can be no *neutrality*.

All, therefore, who are not with the Crown, are, rightly and necessarily regarded as with the enemy, and are subject to such military usages as affect the forces of an enemy. Martial law means the law, whatever it may be, which is imposed by military power ; for which reason it has now no place in our constitution within the realm, except in case of war or rebellion, for it implies much more (*a*) than the establishment of that regular military rule, however strict and severe, which is administered, in ordinary times, in the army under the Mutiny Act and the Articles of War (*b*). It means the establishment of absolute and arbitrary military authority, such as in time of war is exercised over the army, or against the enemy.

From this it is manifest (*c*) that the effect of proclaim-

(*a*) Blackstone's Comment. vol. 2. Part 1, p. 602.

(*b*) "Where martial law is established and prevails in any country, it is of a totally different nature from that which is commonly called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, was contrary to the Constitution, and has been exploded." (Lord Loughborough, *Grant* v. *Gould*, 2 H. Blackstone's rep. 118). That is, in time of peace within the realm, according to the Mutiny Act and the Petition of Right. *Vide ante.* It was contrary to the Constitution because it was absolute and arbitrary. The ordinary military law, as laid down in the Mutiny Act and Articles of War, is terribly severe. The act itself makes provision as to certain specific offences, and fixes the general nature of the punishments to be inflicted, so that if any soldier shall excite or join in a mutiny, or, knowing of it, shall not use his utmost endeavour to suppress it, or hold correspondence with a rebel, he shall suffer death. (2 Black. Comm. 601.)

(*c*) It must mean all this or it must mean simply nothing ; for the fullest power of resistance to actual outrage is already given by the common law under the great natural right of self-defence, and the common law likewise gives the fullest power of regular procedure against traitors or rebels, by

ing martial law, in a district, is to declare it in a state of war, and to place it under the absolute military authority of the chief military commander, to put the population in the position of being *primâ facie* treated as rebels, and to confer an absolute power on the chief military commander of taking such measures as he may deem proper, subject only to the rules and usages of war.

The truth is that, as the very phrase martial law (*a*) imports, it is not that under martial law the ordinary law, is administered in a more summary way, but it is a totally different law, which is, indeed, no law at all, in the

indictment, arrest, legal trial, and strict legal proof, all of which, of course, interpose such difficulty and delay, as to render it perfectly idle and useless upon a sudden conspiracy and imminent public peril. The highest military and legal authorities describe the effect of martial law to be the establishment of a state of war, and of absolute military authority. Thus, the Petition of Right distinctly describes it as a power of summary execution by martial law. Thus, in the great case of *Grant* v. *Gould*, 2 H. B. Lord Loughborough speaks of it as quite different from regular courts martial under ordinary military law, and as involving a state of war. Thus, Lord Hale speaks of it as no law at all, &c. *vide ante*. Thus, Simmons states, "That courts martial are regulated by the Mutiny Act, and the Articles of War, and general orders, and that their practice is moreover regulated on points where that law is silent, chiefly by the customs of war, *i. e.* the usages of the British Army (Simmons on Court Martial, p. 87). So it is laid down in that work, p. 97, that, "The proclamation of martial law *renders every man liable to be treated as a soldier*, that is, liable to be tried summarily for the same offences, and to suffer the same penalties for the same offences." To the same effect was the opinion of the Attorney-General of Jamaica; and in his evidence he declares it impossible to define martial law, otherwise than that those taken are liable to be treated as rebels.

(*a*) The Articles of War, which form the only definition of offences cognizable by military law, include a number which are no offences at all by the common law, and render others, which at common law are mere misdemeanours, capital. Thus, for instance, the offence of sending intelligence to an enemy, that is, to a rebel, is by military law capital. So is the offence of seditious words, or even the concealment of seditious papers. Seditious words indeed, and still more seditious public actions, or proclamations, tending to inflame the population, although at common law a mere misdemeanour, is, under martial law, visited with the capital penalty, and regarded as most formidable.

sense in which that phrase is usually understood, but is at all events in its offences and of penalties, as well as in its mode of proceeding, or of proof, utterly different from those which prevail under the ordinary law of the land. It is the application of military law to the whole population of the district, and every one knows how unlike that is to the ordinary law.

The true reason of this distinction (*a*), and the real key to the subject of martial law as distinct from ordinary law, is, that its scope is not so much legal culpability as military exigency; or, in other words, not so much criminality as public safety; and hence, although at common law the criminal *intent* is always so important, and, indeed, generally essential (always in capital crimes), it is not so in martial law, which looks rather at the actual than the intentional cause of the mischief, and the necessity for an exemplary penalty.

The greatest authorities (*b*) of the common law itself,

(*a*) The scope of the common law on criminal questions, is the vindication of the law in ordinary times and under ordinary circumstances, when, therefore, the main object is the avoidance of injustice to the accused, and the satisfactory demonstration of his guilt. But, under martial law, the paramount object is the safety of the State, and the meeting of the imminent peril which is supposed to threaten it. Those rules of strict proof, and that perfect demonstration of guilt, therefore, which are required by the criminal judicature at common law, are dispensed with necessarily under martial law, or it would utterly fail of its object. Under common law the question is, whether it is clearly made out that the man is guilty; under martial law, the great question is, whether he has caused the mischief, so that he must be *taken* to have intended it; and whether his death is necessary to remove the danger he has caused.

(*b*) Thus, Lord Hale, in treating of treason, and, in particular, of that kind of treason which consists in adhering to the King's enemies, distinguishes cases in which the offender might be liable to death by martial law, although not guilty of the crime of treason, because not having that criminal intent which is of the essence of that crime. Thus, he says of one case, "Though the charge was treason, and possibly the proofs might amount to it, the facts found did not amount to it, because showing no treasonable intent;" and then he goes on, "The truth is, if it were delivered up by treachery it might be treason, but if delivered up upon cowardice or imprudence, without any treachery, *though it were an offence*

distinguish between the criminal intent which is essential to the legal guilt, and that matter of fact, quite apart from actual intent, or guilt, which may justify even a sentence of death under martial law in time of civil war or rebellion, and recognize that the nature and scope of martial law, as of war, is rather the suppression of hostility and the removal of danger, by means of terror, than the vindication of law.

The great difference here arises, as has been already pointed out, from the distinction (*a*) between the scope of common law and of martial law; in that the former mainly regards guilt, the latter chiefly regards danger. The one, therefore, exacts strict legal proof of guilt, and especially the intent; the other, looking rather to the danger, looks only to the actual cause of the danger, and less to the intent, and to the actual or probable result of the punishment to be inflicted on persons supposed to be implicated.

As regards the apprehension of persons on suspicion, there is the utmost difference between common law and martial law. By the common law (*b*), the suspicion must

against the laws of war, and the party subject to sentence of death by martial law, as it once happened in a case of the like nature in the late times of trouble, in the case of Col. Francis, Parliamentary Governor of Bristol, for surrendering the same to the King's forces." (See State Trials, vol. i. p. 745.) "Yet it is not treason by the common law unless it was done by treachery; but though the sentence was given *in terrorem*, it was not executed; it seems to be a kind of arbitrary sentence." (Pleas Crown, vol. i. p. 168.)

(*a*) The reasons of this distinction have been already pointed out, and they arise from this, that common law is the law of peace, and martial law is the law of war. (*Vide ante.*) This distinction is radical, and essential, and pervades the whole subject. In time of peace, the courts can afford to be strict, critical, and technical in the definition of offences or the proof of guilt; but in times of great public danger, there really is not time for it, and there would be no sense in it. The question then is, who has caused the danger, or helped to cause it, and who are those whose prompt punishment will be most deterrent. At such a time, if it is plain that a man has *caused* a rebellion, and that nothing but his death will stop it, what does it matter whether he directed exactly what has happened?

(*b*) Under the common law, a person arrested must be charged with some specific offence, as, that he has set fire to such a house, or killed such

be of some specific felony or crime already committed, and there is only a right of apprehension for judicial inquiry. By the law martial, or rather by military usage—it is enough that there is a suspicion of general complicity in the rebellion or conspiracy; and the seizure is for the purpose of prompt and summary disposal.

So far as regards the resistance of acts of outrage, or suppression of actual rebellion, the common law is identical with, and includes martial law, for, as already shown, all persons, soldiers or citizens, with or without the authority of magistrates, may resist rioters and suppress riot and tumult (*a*), with force of arms if necessary, and (*b*) so, even as to the *apprehension* of persons on *suspicion* of a felony which has already been committed.

It is as regards general complicity in rebellion, apart from acts of outrage (*c*), and as to measures taken to prevent

or such a person, and the like. At all events, unless he can be fixed with participation in some general criminal design, as conspiracy or treason, it is not enough that there are circumstances to show that he has been guilty of some acts of crime, or that he is in complicity with the rebellion; he must be fixed either with being a party to it, or with some specific crime. There may be hundreds or thousands, of whom there is no moral doubt that they have committed some crimes, and that they are in complicity with, and secretly assist, the insurgents, who cannot legally be fixed.

(*a*) *Vide ante* p. 30.

(*b*) It is here that the divergence between the common law and martial law begins. There is a distinction, at common law, between constables and private persons, so that though both may arrest on suspicion of felony, the latter do it at their peril, unless a felony has been committed, and unless the grounds of suspicion are reasonable. (*Mure* v. *Kay*, 4 Taunt.) Whereas the power of a police officer is larger, and he may arrest, not only on suspicion of guilt of a felony which has, in fact, been committed, but on suspicion of a felony which, it turns out, has not been committed. Supposing a felony committed, and the party charged refusing to surrender, he may, if necessary, be killed by the officer. (*R.* v. *Woolmer*, 1 M. C. C. 334.)

(*b*) The object of all criminal prosecutions and punishments is to deter others from the like offences; but the process at common law is so slow and uncertain that in times of public peril it totally fails. The peril will be over, or will have proved fatal, before the parties—even if they can be arrested and convicted—can be prosecuted. Therefore the deterrent effect of martial law, as compared with common law, must necessarily be

such acts from *being* committed, that martial law differs so widely from the common law. As regards both, the object is the same, and the main means adopted under martial law are, in crushing the spirit of rebellion through the terrors imposed by the stern, summary severity of military measures.

As to the military measures to be adopted, and especially as to the manner under which the inhabitants are to be arrested (*a*), or otherwise dealt with, it must be a matter of military discretion, dependant upon military exigency and upon all the circumstances; the governing principle being that the basis of martial law is *danger* rather than guilt; and the meeting of danger by the exciting of terror.

Of course, the proposition on which martial law rests, viz., a state of rebellion, involves, in one sense, the right to treat every man in the district as *prima facie* a rebel; but it would be perhaps more correct to say that it

in being infinitely more prompt, speedy, and summary in its seizure and punishment of offenders.

(*a*) Of course, martial law must involve the discretionary power of arrest, that is of arrest on *general* suspicion, as distinguished from that particular suspicion supported by specific proof, which alone justifies an arrest at common law for an offence already committed. For the mere suspension of the *Habeas Corpus Act* involves that, and martial law means infinitely more than the mere suspension of a special statutable guard to the liberty of the subject as it exists at common law. It means the *suspension of the common law itself*, and the substitution of military law, now under ordinary military law; first, there may be an arrest or charge of any offence known to military law, which may not be available at common law, as insubordination, mutiny, &c., and next, follows from this, a power of killing in case of flight or resistance, if it is impossible otherwise to arrest, as at the common law, in case of lawful arrest on a charge of felony, and then, further, there is, of course, a right to attack and disperse any body of persons found together under such circumstances as to suggest to the military even the suspicion that they are a body of rebels, unless they submit and surrender themselves as prisoners, in which case, of course, their cases are to be inquired into. Further, military law involves an unlimited power of arrest of persons on suspicion of complicity in the rebellion, even in their habitation, and so of persons out lurking about at night, which, indeed, may, sometimes, under martial law, after notice, be punishable by death.

involves (*a*) a right to treat them as is proper to treat persons in a district which is in a state of rebellion, or as soldiers are liable to be treated in time of war, *i. e.*, with strict military discipline, according to the usages of war. This necessarily involves the discretionary power of making prisoners, and of summarily dealing with them.

Under martial law, those acts or offences which, under common law are only misdemeanours, and liable to the regular, deliberate legal procedure, as for instance (*b*) seditious publications, tending to stir up sedition and rebellion, become, on account of that tendency, grievous and dangerous offences, punishable, according to military usage, by death, because, although, at common law, in time of peace, they are of no great mischief, the result being trivial,—in times of danger, and of universal insurrection, they are the most formidable and fatal offences.

Nor is it in the least necessary, under martial law, as it is at common law, to bring home to a party charged with seditious or rebellious incitements complicity with any

(*a*) This must necessarily be the result, because martial law is the establishment of a state of war, and the extension to the whole population of the laws and usages of war, one of which is, that all bodies of men, apparently assembled in hostility, may be attacked, and that all men whom it is thought are enemies or rebels, may be arrested and subjected to military inquiry, and all contravention of military discipline treated with summary severity under law martial; as, going about at night, seditious words, plunder, intelligence to the enemy, &c., possession of plunder, or weapons, or ammunition, or the like.

(*b*) It is certain that it is a very high aggravation of a libel, that it tends to scandalize the Government by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace by stirring up the parties immediately concerned in it to acts of revenge, but also has *a direct tendency to breed upon the people a dislike of their governors*, and incline them to sedition and rebellion. (Hawkins' Pleas, Crown, B. 1, c. 70.) This direct tendency is to stir up rebellion, which may be comparatively unimportant in time of peace, but become fearfully formidable in a time of popular excitement and of imminent insurrection, when large multitudes of people are only waiting on a little incitement to raise an actual rebellion. Therefore martial law deals with it very severely. (See Simmons on Court Martial.)

particular acts of outrage which may have been committed (*a*), for instance, a massacre. At common law it would be so at all events, in order to inflict a capital sentence, because to that end the party must be guilty of the act of murder; but not so at martial law, by which the sedition itself *per se*, however general, and whether or not proved to have caused the particular acts of outrage, is capitally punishable.

It would be idle to expect any great deterrent effect through observance of the strict rules of proof, as under common law. After all, evidence (*b*) is in substance a mere matter of probability, and those positive rules of legal proof which are observed so strictly in our common law courts, are not only sneered at by philosophic jurists, but are admitted by learned lawyers to be mere positive rules, comparatively modern, and to be adapted in a great degree to the infirmity of the trial by jury (*c*), which forms the essence of our common law system.

The distinction is this (*d*) that, as in most human

(*a*) It is hardly necessary to mention that at common law sedition is not capital, although treason is, and though a riot may be felonious. To authorize a capital conviction there must be legal proof of a capital offence, and by our present law no offences are capital but treason and murder; therefore a man cannot be convicted capitally for a murder at which he was not present, and which he cannot be shown to have incited—that is, at common law he must be shown to have incited to that particular murder or massacre, and it is not enough that he can be shown to have issued seditious proclamations, &c., which, in point of fact, led to the massacre, if he cannot be shown to have intended it, although it is manifest that he must have known it had a natural tendency to result in some such disaster. Under martial law, this strictness of proof and sequence is not necessary, and it is enough that a man published seditious proclamations, tending to rebellion, whether or not intended.

(*b*) Locke and Hume both agree in this, and Lord Chief Baron Gilbert, quoting the latter, says there are several degrees of it from perfect certainty and demonstration, quite down to improbability, and even to impossibility.

(*c*) *Vide* per Tindal, C. J., 8 Bing. 58. Coleridge, J., *Wright* v. *Tatham*, 4 B. N. C. 10. *Rutzen* v. *Farr*, 4 A. & E. 561.

(*d*) *Vide Burdett* v. *Abbott*, 4 B. & Ald. rep. 61. So, Gilbert on Evidence. "All probability is founded on obscure and indistinct views, or upon reports from the sight of others; and it is very plain that where

affairs, it is impossible to arrive at absolute demonstration, it is a matter of degree of probability, and the common law in criminal matters demands the highest degree (*a*), while under martial law, the theory of which is a great public peril and an imminent danger to the State—the authorities who have to act in such an emergency must take what evidence they can get, and often must act on a much lower degree of probability, founded on the same credibility of testimony as the highest.

Nor, again, is any formal trial, nor any strict legal proof necessary; the trial may be quite summary. It is of the essence of martial law that it involves the power of speedy summary procedure, with or without trial, for offences against such law; and, on the other hand, as it is the suspension of the common or ordinary law of the land, it necessarily involves the dispensation of the strict rules of legal trial, and especially of proof, and it is sufficient if at the time there is such proof as satisfies the honest judgment of those who have to act.

we cannot see or hear for ourselves, and yet are obliged to make a judgment of it, we must see and hear by report from others, which is one step further from demonstration, and yet there is that faith and credit to be given to the honesty and integrity of credible and disinterested witnesses attesting any fact, and by the solemnity of an oath and the penalties of perjury, that the Courts equally acquiesce therein as on a knowledge by demonstration, and this is the original of trials and all manner of evidence." *Ibid.* And as this principle is applied at common law to facts the witnesses state of their knowledge, so in a lesser degree it applies to what they state on hearsay or the contents of written documents they have seen, &c., although excluded by common law.

(*a*) The legal rules of evidence only apply to matters in which the course of the common law prevails (*Fell* v. *Hutchins*, Cowper's Rep. 424), and not to proceedings before a *forum* not subject to the course of the common law, as in the case of a visitor, "who does not proceed, according to the rule and forms of the common law, but suffers a party *allegare non allegata et probare non probata*, and decides entirely on the merits." (*Rex* v. *Grunder*, *Ibid.*, 322.) Courts martial are subject to the control of the courts of common law only, so as to keep *them within their jurisdiction* (*Grant* v. *Gould*, 2 Hen. Blackstone's rep. 68); not that they are bound to adopt all the rules that have been established in the courts of law, which cannot be affirmed. *Ibid.* And that was said of ordinary and regular courts martial

The common law (*a*), indeed, lays it down that a man must be taken to have intended the *natural* results of his own words or acts, so that if he has issued publications or proclamations calculated to incite to sedition or rebellion, he is to be deemed guilty of an intention to excite sedition and rebellion. But, then, this principle only extends to the *direct* natural consequences, not the indirect; and, therefore, though at common law a man may in such a case be convicted of sedition, because he is deemed to have intended and incited to *sedition*, he is not deemed guilty of murder, or other acts of outrage, arising from the sedition, though *morally* he is guilty. Thus, in Sir F. Burdett's case, the judge told the jury in summing up, that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances, and that, if its contents were likely to excite sedition, the defendant must be presumed to intend that which his act was likely to produce. And so it has been held, again and again, in cases of sedition (*b*), and it is a general rule and principle of law.

It should be borne in mind with regard to procedure before court martial, that though, as a matter of precaution in ordinary times (*c*), the common law requires certain rules

governed by strict military rules, not of courts such as are established under martial law, which are governed by no rule at all.

(*a*) *Rex* v. *Burdett Bart.*, 4 B. & A. 95; 3 B. & A. 717; so in Horne Tooke's case, the judges said in the House of Lords. "The crime of seditious libel consists in conveying and impressing injurious reflections upon the minds of the subject. If the writing is so understood by all who read it, the *injury* is done by the publication, before the matter comes into court.', (Cowp. rep. 685.) So Lord Mansfield said: "It is the duty of the jury to construe plain words according to their obvious meaning, and as everybody else who reads it must understand them." *Ibid.*, 680. But if the jury doubt as to what everybody understand from the words, the offender may escape.

(*b*) *Vide* Re Harvey, 2 Barn. and Cress. 257.

(*c*) It is only in general rules that the rules of precedure at common law are vindicated by Judges, or great Jurists, or legal writers, (*Vide* Best's Treatise on Presumptive Evidence, p. 112. *Et vide ante*, p. 60).

to be observed, it is rather for the sake of *general* rules than because of their intrinsic or essential necessity or justice; and that writers (*a*) of a philosophical character, approve of a more natural and less artificial mode of procedure, and speak of courts martial, with other instances of summary jurisdictions, as instances of what they call natural procedure.

The whole course of common law procedure in criminal matters is, as we have seen, based upon the principle of providing as much as possible for the security of the *accused*, and that is the great object in view. Hence the necessity for a specific charge and sworn information, even to warrant an arrest. Hence the strict requisitions of pleading and of proof. Hence the onus is on the prosecutor to make out his case. Hence the necessity for the clearest and most conclusive evidence as to warrant a conviction. Hence the need for an unanimous verdict of a jury of twelve men. But the great object under martial law is the safety of the State, and to that the security of the individual must give way. If it were otherwise, martial law would not be declared or allowed at all, for, beyond all doubt, it provides rather for the security of the state than for the individual, and takes no particular precautions for

(*a*) Mill, in his History of India, is very strong against our artificial procedure, as he calls it, especially the rules of evidence; and though no doubt he carried his views much too far, as regards a general and ordinary system of administration of justice, his ideas alone suffice to show that there is nothing so sacred in our rules of procedure or proof, as to render a departure from them a denial of justice. Jeremy Bentham, again, speaks with entire, though no doubt extreme, contempt of them, and holds that courts of summary jurisdiction are courts of natural procedure, and better than others whose procedure is more formal. And he especially instances courts martial as courts of this natural character, superior, as he deems them, to legal tribunals, because not fettered by strict rules of proof. And it is to be borne in mind, that in time of rebellion, and under martial law, our common law itself adopts this view, and consents to its own jurisdiction being suspended and a more summary system established; and our greatest Judges have declared, that all that is essential in such cases is an adherence to natural justice. (*Vide* the author's notes to his report of *Dickson* v. *Peel*, 3 Finlason's rep. 632).

the protection of those who are presumably and, *primâ facie*, rebels. The principle on which it is presumed that all the able-bodied inhabitants in the proclaimed district are rebels; is plain and simple enough, as it has already been explained, and is, in short, only an expansion of the principles of the common law itself. For at common law, in time of rebellion, it is criminal to be neutral, and the refusal to assist in quelling a riot is an indictable offence, while even connivance at sedition or treason may be a serious crime. Thus, under martial law, the state of war being proclaimed, it is the duty of every able-bodied man in the district at once to rally round the Government, and assist in putting down the rebellion; and hence it is, that it is presumed, *prima facie*, that every able-bodied man who is not active on the side of law and order, is a rebel. The presumption is a just and fair one, for it is *certain* he is culpable, and it is probable that he would not incur that culpability, if it were not for complicity, secret or open, active or passive, with the rebellion. And that complicity is criminal.

Hence it is, that, under martial law, the whole able-bodied male population are deemed, *primâ facie*, to be in a state of rebellion. And hence it follows that they are all liable to be arrested on suspicion. And although it requires something more to subject them to attack, or to the summary infliction of the capital penalty of treasonable rebellion, it requires very little more in the way of presumptive proof. If, for instance, any body of men are found in arms, that is, of course, quite sufficient to warrant attack, and to subject such as may be taken prisoners to summary execution; so, if they are taken red-handed, as the phrase is, that is, with weapons bearing the signs and marks of recent conflict; or if they are taken with property of those who have recently been robbed or murdered upon them; always supposing that, in such cases of presumptive proof, no explanation or exculpation is offered.

But upon the principle already explained, the burden of

proof is upon the person seized. It is just the opposite state of things to that which exists at common law. For, whereas at common law the presumption is against crime and in favour of innocence, and every man is to be presumed innocent until proved to be guilty, and proved upon strict legal proof, and on the clearest and conclusive evidence; under martial law it is exactly the reverse of this, for, as already known, the men who are seized, standing aloof from the Government in a time of rebellion, are already, from that very fact, apart from any other evidence, in a position of suspicion, and more than suspicion, they are clearly criminal to *some* extent; they are *probably, most* probably, guilty of complicity in the rebellion. It needs but some circumstances to raise a probability of *active* participation in it, and then, under martial law, the capital penalty *may* be exacted, if necessary or expedient.

Martial law means, in fact, military discipline, that is, the application of it to a disaffected population, or a population the whole of which are preparing for rebellion by means of drilling and arming, and are believed to be disaffected. And it operates chiefly by terror of summary military executions, and by the rigid restraints of military discipline. Its operation, even when inflicting military executions, is really merciful, for it is certain to save life in the long run.

When the Governor of a colony has declared martial law, his part in carrying it out appears to consist either in giving general or particular orders to the Commander-in-Chief (*a*) to carry it out, or in sending prisoners to the

(*a*) It was stated in the Jamaica case, by the Commander-in-Chief, to be doubtful whether the supreme command rested with the Governor or the Commander-in-Chief. The Governor is captain-general by the terms of his commission, and it is a matter, purely military, how far this authorizes any direct interference with the military dispositions of forces. In point of fact, such dispositions are, and in that case were, made by the Commander-in-Chief, at the requisition of the Governor. The Commander-in-Chief appointed a brigadier as commander in the field, and he (as the military commanders considered), would be personally responsible for the orders

commander, acting in the field, for the purpose of trial by court martial. As to the former, for his own particular orders, of course, he is responsible; for his general orders, only so far as they are carried out in accordance with military law, or the usage of the service.

The question, what means and measures may be taken under martial law, must necessarily be mixed up with the question (*a*) of legal liability for acts done under martial law. The decisions in courts of law, as well as of the works of military writers, lead alike to the conclusion, that in time of war, mutiny, or rebellion, there is an absolute discretionary authority, so that there can be no legal liability as regards the supreme authorities who put it in action, nor as regards those who give or obey military orders under it.

It becomes necessary, therefore, to distinguish between the various parts or functions taken by the persons in the declaration or execution of martial law (*b*). The declara-

actually given, and the measures actually taken under those orders. He had no particular orders, but only general orders from the Commander-in-Chief, having therefore a discretionary power only controlled by the usages and rules of the service. And he issued orders to the officers commanding particular detachments.

(*a*) There is not, that the author is aware, any authority for maintaining that a Governor or Commander-in-Chief, or any military commander or officer, or soldier, lawfully putting martial law in force under legal declaration of it, can be legally liable for *orders* issued or obeyed under and by virtue of martial law, *i. e.*, under and by virtue of military authority. Any apparent authorities to the contrary are either clearly distinguishable, or have been overruled by the highest authority in the country—the House of Lords—who appear to have established in the great case of *Johnstone* v. *Sutton*, 1 T. R. 528, that there can be no legal liability for an abuse of a military discretionary power. If martial law be, as it seems to be, a discretionary military authority, this great case is decisive of the question. Of course, this leaves wholly untouched (1) cases of utter illegality, through total want of jurisdiction or authority; (2) cases of acts done during martial law, but not really under and by virtue of it, that is, not really in pursuance of it, but under colour of it, and for private malice and revenge; and (3) cases of acts done without orders or authority at all.

(*b*) The declaration of martial law is one thing, and it is, of course, fundamental. If it is illegal, then all that is done under it (unless otherwise justifiable) is illegal. But assuming it legal, then all acts done under

tion is the act of the Governor or other supreme authority. Its execution is directed by the commander of the forces. Its direction is entrusted to the general commanding the forces in the field. Its actual execution to different officers commanding detachments, the men under whom have simply to obey orders.

Even if, in a proceeding in a court of common law the Governor of a colony could be made legally liable for anything done under martial law. it is conceived that it is abundantly clear (*a*) that it must be either on the ground, not merely that there was no rebellion to justify the de-

and by virtue of it must be legal also. The Governor, declaring it illegally, would be liable for all acts done under it, in its ordinary exercise, though not for acts of abuse or excess, *not* done by his order or direction. So the Commander-in-Chief would be liable for his orders, and for anything done under them, and if martial law were legally declared, he would be justified except as to any excess or abuse he personally ordered. So of the Commander-in-Chief in the field, the acting commander; so of the various officers acting in different places under him. Any one acting under orders would be justified, except for anything which could not be justified by any military usage, as the slaughter of infants. But short of all, such as that, the exigencies of military service are so various, and so undefinable, that it would be dangerous to lay down any definite rule as to what could not be justifiable under military orders; it must be something very gross, which might not be. But, those who committed with their own hands or by personal presence and direction, acts without, or beyond orders, would be personally liable.

(*a*) This seems the meaning of Lord Chief Baron Macdonald in Governor Wall's case, where there was strong evidence of malice. "When a well-intentioned officer is at a great distance from his native country, and it shall not appear that circumstances arise which may disturb and alarm the strongest mind, it were not proper that strictness and rigour should be required, where you find a real, true, and genuine intention of acting for the best for the sake of the public. He is in a position for giving assistance and advice; and if in those circumstances he should be somewhat thrown off the balance of his understanding, and does not exceed greatly the line of his duty, allowance for such circumstances ought to be given to him. But, on the other hand, if he shall, by reason of his distance from control, *wanton* with his authority and command, it will be the duty of the law to control it and keep it within bounds," (28 St. Trials, 148.) So is the language of Lord Loughborough in the leading case of *Grant* v. *Gould*, 2 Hen. Blackst. rep. 2. "That courts martial are under the control of courts of law to bring them within the bounds of their jurisdiction."

claration of martial law, but that there was no real belief in it, and that it was a mere colour and pretence, or that the act, though done *during* martial law, was not really done *under* martial law, but was done wantonly and wickedly, and under *colour* of martial law.

When the authorities (*a*) are closely looked at, it will be found that there is none in which the question of a mutiny or rebellion, or the measures necessary for its repression, in a case in which a Commander or Governor has really formed a *judgment* thereupon, has been left to a jury in a court of law. But the question has always been whether the mutiny or rebellion was merely set up as a pretence, in order to the indulgence of vengeance, malice, or revenge, under colour of it, and not really under it.

Assuming a state of martial law lawfully established, the Governor cannot be liable for acts done under it, not done by his direct personal authority. Even in a case of an act done by the direct military order of a Governor or Commander, its illegality must depend either upon want of jurisdiction or authority, or on a bad and wicked motive, or upon such gross reckless excess as in our law, implies it.

(*a*) Thus in the case of Governor Wall (28 St. Tri. 36), the case for the prosecution, as stated by the Attorney General, was not merely that there was no mutiny, but that there was no pretence for it, and that the pretence of it had been made the colour for inflicting murderous punishment (p. 56), and the Lord Chief Baron, though he did not put it so clearly, yet taking the whole of his summing up, perhaps substantially put it so, for he told the jury that if the evidence for the Governor was true, there was not any doubt that there *was* a mutiny, and a very serious one; but he pressed it upon them that the Governor had *never set it up at all*, until the time of his trial, so that it must have been a mere pretence and afterthought, set up to rid himself of the criminal charge, so that in that view (which the jury adopted) it must have been a mere colour and pretence. Beyond all doubt, however, there were grave grounds of objection, or, in an ordinary case, there would be, to the way in which the Lord Chief Baron formally put the question at the end of his summing up, mutiny or no mutiny, for that might lead the jury to suppose that the only question was whether in their judgment there was or was not a mutiny. Lord Ellenborough, a far higher authority, put it correctly, that the question was whether there was a mutiny, or whether it was made a *mere colour* and pretence.

And it is not a mere error of judgment which will render him liable, provided he had jurisdiction or authority, the entire absence of which, of course, will render him liable legally, although he may be entitled to an act of indemnity. (*a*)

It may be (*b*) that a Governor, even though a person representing the Sovereign in all functions, civil and mili-

(*a*) This was remarkably illustrated in the case of *Wall* v. *Macnamara*, cited, 1 Term. rep. 536. That was an action by the plaintiff, a Captain in the African Corps, against the defendant, a Lieutenant-Governor of Senegambia, for imprisoning him for nine months at Gambia, in Africa. The justification was under the Mutiny Act for disobedience of orders (*not* in time of war), and the imprisonment was at first legal, but was aggravated by many circumstances of cruelty. Lord Mansfield said: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears to have been upright. It is the same as when complaints are brought against inferior court magistrates, such as justices of the peace, for acts done by them in the exercise of their court duty. The principal enquiry to be made by a court of justice is, *how the heart stood.* And if there appears to be nothing wrong there—great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the *heart is wrong*, if cruelty, malice, or oppression appears to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of justifiation, the most technically regular, from the punishment which is due to so scandalous an abuse of public trust."

(*b*) The case of *Sutherland* v. *Murray* (cited by the Court of Error in *Johnstone* v. *Sutton*, 1 T. R. 538), is, it was said, "strong to show that a person representing the King in all functions, civil and military, where the act complained of is expressly legal, shall answer for an abuse of his authority. There the defendant was Governor of Minorca and Vice-Admiral, and had maliciously, and without probable cause, suspended the plaintiff, who recovered large damages." But that was a Nisi Prius case, and it was cited and upheld by a court whose judgment was reversed by the House of Lords; so that it is of doubtful authority, and, moreover, even if of good authority, (1) there the act which caused the mischief was the Governor's own act, (2) it was in time of peace, (3) it was without reasonable cause, (4) it was wilful and malicious. Liability, under the circumstance of all these conditions is far from involving liability under conditions totally different, and, indeed, the opposite in every respect, and the judgment of the Lords rather goes to negative it.

tary, when the act complained of was done in time of peace, and under the common law, shall answer, in a court of law, for a wilful and malicious abuse of his authority,—that is, where the act which has caused the injury was his own act, was without reasonable cause, and was also malicious. But this does not apply, where the act was in time of war, and the reasonableness of the cause itself is a matter more or less military.

Even in such cases, however, a wide distinction is drawn (*a*) between a time of war, mutiny, or rebellion, when circumstances may require, or excuse, under the idea of temporary necessity, much that may be inexcusable, because in no sense or view necessary; and in ordinary times, when no exceptional or extraordinary circumstances exist to disturb the judgment; and this bears more particularly upon the question of excess, which is more or less a matter of degree.

(*a*) Thus, in the case just cited, Lord Mansfield said: "The plaintiff having really been guilty of a breach of discipline, and therefore, his imprisonment having been at first legal, was afterwards by circumstances wanton cruelty. It is admitted that the plaintiff was to blame in leaving his post. But there was no enemy, no mutiny, no danger; his health was declining, and he trusted to the mercy of the Government to consider the circumstances under which he acted. But, supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, where there was no possibility of bringing him to a trial for several months, there not being a sufficient number of officers to form a court martial. These circumstances are sufficient to presume a bad, malignant motive in the defendant, which would destroy his justification, had it ever been within the power delegated to the defendant by the commission." *Ibid.* But then, (1) the act was wholly illegal, (2) it was grossly and wantonly cruel, (3) it was the direct act of the Governor, (4) it was in time of peace. All which circumstances are carefully dwelt upon by Lord Mansfield, so that no authority or analogy can be deduced from this case to govern one in which the act is *not* the direct act of the Governor, or is *not* wholly illegal, and is *not* in time of peace but of rebellion, and is *not*, therefore, under common law at all, and is *not* wantonly and wickedly cruel. So, in the case of Governor Wall himself, tried for the murder of a soldier by flogging him to death; (1) it was in time of peace, (2) it was his personal act, (3) it was wickedly cruel and intended to kill, so it was clearly a case of wilful and wicked murder.

It may be laid down safely, as a general principle (*a*), which has been judicially established, that a person setting or putting any kind of law in force, as a private person giving another into custody, is only liable, even if his own act turns out to have been illegal, for the usual and ordinary consequences of it, and not for any criminal and extraordinary cruelty or excess on the part of those who personally carry out the law.

The state of martial law implying a state of war, the rules and principles applicable to military authority in time of war and not in time of peace prevail, and it may be laid down (*b*) broadly that, under martial law, in time of war or rebellion, *flagrante belli*, as it is called, or in the face of the enemy, no act (at all events unless a criminal intent

(*a*) Thus, it has been held, that a person who illegally gives another into custody, is liable for the usual and ordinary treatment of a prisoner in a police cell, but not for any unusual and extraordinary cruelties inflicted by the police, for which they, not he, must answer. (*Edgell* v. *Frances*, 1 M. and G.) Thus, in one of those judicial decisions, so reasonable and sensible, so based upon a general principle of natural justice, that it may be safely applied to the present question, and the inference may be deduced, that a a Governor or Commander even putting martial law illegally in force, is liable for such acts under it, as would be in accordance with military usage in like cases, but not for any exceptional and criminal application of it by wanton and wilful cruelty on the part of those who actually and personally put it in force, for which they, not he, must answer. In short, he is liable for his own acts (if illegal), not for theirs.

(*b*) This appears to have been laid down very broadly in the case of *Barwise* v. *Keppel*, 2 Wilson's rep., 317, where a serjeant, who had certainly fallen into a breach of military orders, only through neglect and with no bad intent, for which a court martial inflicted a slight sentence on the defendant, and his commanding officer ordered him to be broke or reduced to the ranks, thinking that the neglect might have been attended with the most bad consequences, for which the action was brought. But the court declared he could not say that "the sentence was not warranted by the Mutiny Act or Articles of War; for the Act by which the King's power to make Articles of War is limited, is confined to the King's own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the act or the Articles of War, and, *flagrante belli*, the common law has never interfered with the army. *Inter arma silent leges.*" And Lawrence, J., afterwards oberves "that was *flagrante belli*, in face of the enemy." (*vide Warden* v. *Bailey*, 4 Taunt rep. 67).

is proved), is civilly or criminally punishable in the exercise of, in, or obedience to, military authority.

A similar principle (*a*) prevails in regard to naval warfare; the jurisdiction over all matters of prize, and everything incidental to a capture, belongs exclusively to the prize courts (which are quite different from the ordinary Admiralty courts, and governed by different rules), and the question of prize or no prize must be decided by these courts, and cannot be tried at common law, so that no action lies for the goods, nor even for false imprisonment of the persons taken on board, even although the ship is acquitted; for it would be contrary to public policy to allow captors to be punished by actions, as then no one would venture to capture a ship.

The principle applies the more nearly, because all prize courts, as courts of war, apply equally to prizes taken by sea or land, and the only difference between these and courts martial is, that the former apply to the *status* of the property, the other to the rights of the person; and the jurisdiction of these courts is sole and exclusive in all cases of capture by naval or military force. And so of courts martial, *within their jurisdiction*, ordinary or extraordinary (*b*).

(*a*) *Le Caux* v. *Eden*, 2 Douglas, 594. In that case Lord Mansfield said: "If an action would lie by the owners and every man on board a ship, taken as prize, against the captor, and every man on board his ship, *no man would dare to take a ship.*" And the court confirmed that view, viz., that no action at law would lie, either for imprisonment of the person or for the capture of the vessel or goods, even although by the prize court the vessel was acquitted, because where the injury was the necessary and natural consequence of the capture, the prize court of the Admiralty had the sole and exclusive jurisdiction, though there might be cases in which the courts of law might have jurisdiction for personal ill-treatment, not the necessary effect of the capture, as if the men were treated with unnecessary cruelty. (Willes, J., *Ibid*, 600.) Prize courts in war appear to answer to courts martial under martial law.

(*b*) *Home* v. *Camden*, 2 H. Blackst. rep. 533, 4 T. R. 382, 6 Parlia. cases 203, where the House of Lords held that the prize courts have sole and exclusive jurisdiction in these matters, and that the courts of common law cannot interfere. "It belongs to the King's courts to restrain courts of *peculiar* jurisdiction from exceeding their jurisdiction. And it is only

A state of martial law once established, involves a military discretionary power in the authorities who are entrusted with its execution. The nearest analogy to a state of martial law during rebellion, is the case of war, with which it is in point of law identical; and it has been solemnly held (*a*) by the highest legal tribunal in the realm—the House of Lords—in the great leading case upon the subject, that an abuse of an absolute discretionary military authority, in time of war, cannot be the ground of a proceeding in a court of law.

That, under martial law, on the one hand, the military

when the inferior court has to act upon the *common* law that the courts of common law interfere in matters within their jurisdiction." (*Ibid*, p. 536.) No action, therefore, can be brought in courts of law on such matters. (*Duckworth* v. *Tucker*, 2 Taunt. rep. 86.) And by parity of reasoning, no civil or criminal suit for the honest exercise of military authority, ordinary or extraordinary, within its jurisdiction.

(*a*) In the great case of *Johnstone* v. *Sutton*, 1 Term. rep. 548, which is the leading case on the subject, and in which the judgments of Lord Mansfield and Lord Loughborough were affirmed by the House of Lords, to the following effect:—"That no action lies for the abuse of a military discretionary power in time of war, and that a court of common law, in such a case, could not assume a jurisdiction; that a Commander-in-Chief had a discretionary power by the military code to arrest, suspend, and put upon his trial, any man in his force; and that a court martial alone could judge of the charge. That if this power was abused, as it might be, to oppression, the military law itself would afford a remedy or punishment, for a Commander who should arrest, suspend, and put a man upon his trial without probable cause, would be guilty of a breach of military law; but the same jurisdiction which tried the original charge must try the question of probable cause, which was in effect a new trial of the case, and every reason which required the original charge to be tried by a military jurisdiction, equally held to try the probable cause by that jurisdiction, as it must turn upon military considerations. Commanders in a day of battle (it was said) must act upon delicate suspicion or open evidence of their own eyes; they must give desperate commands, they must require instantaneous obedience. A military tribunal is capable of feeling all these circumstances, and understanding them; but what *condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature? Not knowing the law or the rules of evidence, no commander or superior officer will dare to act.*" All this, it is obvious, appears *à mullo fortiori* to martial law, in a case of rebellion, which, it is admitted, is, at the best, a terrible thing to carry out.

authorities are justified in all means and measures, they really deem necessary; though not in wanton and unnecessary acts of cruelty, which from their nature they cannot have really deemed necessary; and that these means include courts martial or other more summary means of enquiry, in which they are not bound by any formal rules, but only to use the best means they can, under the existing circumstances, for the discovery of the truth, has been judicially decided (*a*).

Even in ordinary times (*b*), and without any declaration of martial law, if there is a mutiny, or reasonable apprehension of it, from mutinous and insolent words on the

(*a*) In the case of *Wright* v. *Fitzgerald*, 29 State Trials, 760, which was an action by a person against a civilian, a high-sheriff, by whose orders he had been summarily and severely flogged, and without, so far as appeared, any enquiry, or any reasonable belief of guilty complicity in the rebellion. It was after the act of Parliament (*vide ante* p. 42), but it does not appear to have been proved that martial law had been proclaimed, or that any certificate had been given as by that act mentioned, that the act was by military order. Nor did it appear that it was under any military order, nor upon any enquiry. It was, however, taken probably as being notorious, that martial law had been proclaimed. The Judge said it was not to be supposed that the legislature, in enabling magistrates to justify under the Act (*vide ante*, p. 43), had allowed them wantonly to exercise power, even though it were to put down rebellion. "It expected that in all cases there should be a grave and serious examination into the conduct of the supposed criminal, and every act should show a mind intent to discover guilt, not to inflict torture before examination or trial; he did not mean, he said, that sort of trial which took place at common law; but the best that the nature of the case and the existing circumstances would allow of." This shows that under martial law courts martial are allowed to try offenders, and are not bound by technical or ordinary rules, provided that the prisoners are tried; but there was no trial in that case, and the man was not really supposed to be guilty.

(*b*) The case of Governor Wall, 28 State Trials, 148, strongly illustrates that. The Lord Chief Baron (Macdonald) in summing up, carefully pointed out that there was neither war, nor mutiny, nor rebellion, nor even mutinous words; that it was like all other times; that there was not even so much as a disrespectful word said; that there was no trial, for there was no hearing of the accused, nor any opportunity of defence; that he was ordered to punishment behind his back, without even knowing that he was charged; that the punishment was excessive, and the expressions of the Governor

part of military persons, in the presence of others, summary military severity would be justified; and even where there has not been a mutiny, nor mutinous words, if a Governor or Commander only acted under an erroneous impression, and without wanton cruelty, or bad and malicious motives, he would not be held liable merely for error in judgment.

Nothing can be more clear, for it has been over and over again recognized by the ablest law officers of the Crown (*a*), and by judicial authority, that in a mutiny or rebellion, a Governor may declare, or act under, martial law, and, on summary enquiry before courts in the nature of courts martial, but not bound even by the ordinary rules of military law, still less by the stricter rules of the common law, inflict severe chastisement.

Courts of law (*b*), not less than military law, recognize

such as to show a bad and wicked malice, which the Judge explains would constitute malice in law, and make an act not legally justifiable murder. The Attorney-General (Lord Ellenborough) in that case expressly admitted that if there had been a mutiny, the Governor might have been justified in inflicting a most severe punishment, without formal trial; but his case was, that there was no mutiny, and that the act was a murder under the colour and pretence of mutiny.

(*a*) In the case of Governor Wall, 28 St. Trial, 56, Mr. Law, the Attorney-General (afterwards Lord Ellenborough), said, in opening the prosecution: adverting to the defence, which was the existence of a mutiny necessary to be repressed by the infliction of such a punishment as had been inflicted on the deceased, who had been literally flogged to death in the presence of, and under the personal orders and express directions of, the Governor: "I admit, to a great degree, the validity of that excuse, if the foundation for it did exist in point of fact, and if there did exist a mutiny which required the strong arm of power to repress, if it was so dangerous in its probable and immediate consequences as to *supersede the ordinary power of trial for such offences*;" but his case was, that there was no mutiny, and not only so, but that it was a mere colour and pretence, to enable the Governor to inflict unauthorized punishment on an object of his vengeance, and that there was no trial at all, and no real offence; while, on the other hand, the punishment was murderous and intentionally so.

(*b*) Thus in Governor Wall's case, 28, St. Trial, 154, the Lord Chief Baron, commenting on the evidence of a witness who stated that he knew what drum-head courts-martial were, but that in the case in question the prisoner was not allowed to make any defence, said, "I suppose drum-head courts-

for military persons or persons under martial law, in times of mutiny, or rebellion, or war, what are called in military language "drum-head courts-martial," at which, when the danger is so great and pressing that the ordinary mode of summary courts-martial cannot be followed, so many officers as can be got together are assembled hastily, and are authorized to proceed summarily, without any other inquiry than the best they can make under the circumstances.

The principle which has been judicially established is, that if there is a mutiny or rebellion, persons under military law (as all persons are under martial law), may be dealt with summarily and severely; and that even if the matter can be brought before a court of law at all, in a criminal prosecution against the Governor or Commander, it can only be so in a case in which he has personally ordered the punishment without *any* trial or enquiry, and with actual malice, or bad motive (*a*).

martial mean that when the alarm is such, and the danger is so great, that the regular mode of summoning courts-martial cannot be followed, so many officers as are upon the spot are to be summoned together; but that they are not to proceed, altogether without any regard to the interest of the prisoner, though they may not proceed exactly according to the directions laid down in the Articles of War." A drum-head court-martial is suddenly called, and as well formed as circumstances will admit of, upon the plea of necessity. The present purpose has to do with the law, and not the facts, but the facts of that case are a salutary warning in more ways than one; for, on the one hand, the excessive degree of the punishment, and the weapons used, and the personal part taken by the Governor in it, all tended to show that he was acting under feelings of revenge; and, on the other hand, a close scrutiny of the evidence of the witnesses against him (who, it will be observed, if the mutiny existed, were themselves implicated in it), will convince any one that there was a mutiny; that the sentry pointed a bayonet at the Governor's breast; that there was a trial; and that the deceased was the ringleader. The jury, however, found otherwise, and that finding rules the law, but this case is a great warning not to credit too easily complaints against a Governor who has proceeded with severity.

(*a*) Thus in the case of Governor Wall, 28 St. Trial, 127, the Lord Chief Baron left to the jury whether there had been a mutiny or not; such a mutiny as would put a good officer, a man of common firmness, into such a state of alarm as would make extraordinary measures necessary to quench

It is manifest (*a*), that this power extends to trial and punishment for offences *already committed*, and not merely to resistance or repression of *present* acts of mutiny or rebellion, for otherwise martial law would not differ from ordinary law, and it is distinctly laid down that persons under martial law, *i.e.*, in case of mutiny or rebellion, may be summarily tried and convicted, without even the ordinary forms of military law, and with only such inquiry, whether by court-martial or otherwise, as the circumstances admit of; and if by court-martial, then by *such* evidence as can be obtained.

the fire instantly by overthrowing it in the speediest way that he possibly could; and he told them that if there was no such mutiny, and if there was no court-martial or trial of any kind, and the deceased was, by the direct order of the Governor, sentenced to an excessive punishment, inflicted by his personal order, in an unusual and cruel manner likely to cause death, then the jury might infer malice, which would make it murder. It is needless to point out how entirely different such a case is from one where there is a mutiny or rebellion, and martial law has been lawfully proclaimed, and the Governor has not personally interfered, beyond putting a man on his trial, and there is no pretence for inferring malice; however, it must be borne in mind that were it not for the *personal* directions, the absence of any trial and the presence of violent malice, it would be doubtful whether the questions of mutiny or no mutiny, rebellion or no rebellion, would be for a jury, seeing that it is a question on which the Governor is bound to form his judgment, and it might depend upon circumstances, of which a jury could not judge, and this seems implied in the judgment of Lord Mansfield, in the case of *Johnston* v. *Sutton*, 1 T. R., for circumstances might, in the judgment of military men, amount to mutiny, which a jury might not so consider, and it would be monstrous to make a man's liability for murder depend upon an error in the honest exercise of judgment; but the jury thought in Wall's case that there was *no* judgment exercised, and that it was all a mere pretence.

(*a*) Thus the Lord Chief Baron, in Wall's case, said, if there was no mutiny, and if there was *such a court-martial as could be had*, if there were reasonable notice to the man, that he was charged, and if he was called upon for his defence, and if there was an opportunity given him of defending himself if he could, and there was as much attention to his interest as the circumstances of the case would admit of, then the defence would be made out; and the Attorney-General put it that it would suffice if it were shown, supposing a mutiny, that the ordinary mode of trial could not be resorted to, and that, upon conference with his officers, the Commander

All that is necessary in case of actual mutiny, or even the imminent peril of it, if really formidable, is, that there shall be the observance of those rules of common justice and humanity, which are universally obligatory, which are independent of all positive laws or forms, and the wilful, non-observance of which indicates a bad motive, not an honest intention to do what is right and really necessary (*a*). And a similar principle applies to the case of a rebellion.

It seems self-evident (*a*), that, when martial law has once been lawfully declared and established, to render a person legally liable, criminally or civilly, for acts they have done or ordered under it, the acts must not only be such acts as are offences by military law, as *beyond* and *in excess* of martial

did that which on the emergency was thought best to be done, but that, in point of fact, there was *no trial*, not the very loosest; no trial of any kind, and not only no crime, but no belief in it.

(*a*) Thus the Attorney-General in Wall's case (28 St. Trial, 591) said there may be circumstances which may constitute a sufficient defence for a military officer in the infliction of punishment, without either a regimental or general court-martial; for if there be that degree of imminent necessity existing which supersedes the recourse to any ordinary tribunal; if there be actually that flagrant mutiny which must either be repressed with force, and by the immediate, though irregular application of severe punishment, or must be left to rage uncontrolled, at the utmost peril of public rights; that which is irregular, becomes, if that which is regular cannot be resorted to, itself regular and capable of being justified upon every principle of public duty, for it imports the public safety that the means of resisting an enormous and overbearing evil should be as strong, sudden, and capable of application, as the evil itself is capable of immediate, mischievous effect; but if it appears that there was no mutiny and no crime, and *no trial*, and that in addition to that there was malignity of motive, then the case leads to the contrary conclusion.

(*b*) For it is a general principle that the criminality or culpability of an act is determined by the law prevailing at the place and time where it was committed; hence the doctrine as to the *lex loci*, which applies to torts as well as to contracts, for an act may be justifiable by the law of the place where it was done; hence the legal principle that "crime is local," which was laid down in a case of an act done by a Governor abroad (*Raphael* v. *Verelest*, 1 Wm. Blacks. rep. And see *Mure* v. *Kay*, 4 Taunt., *per* Heath, J.) The trial may be here, either at common law (*Mostyn* v. *Fabrigas*, Cowp.) or by statute, as by the 42 Geo. III, c. 85, in the case of foreign Governors, but the law is local; a principle, obviously, *most* important in criminal matters. There is

law, as contrary to military usage, or without military authority, but really *under colour* of martial law.

It follows from these premises (*a*), that all the officers and men employed in the service are amenable only to military discipline and military law, and are justified in acting on the orders they receive, whether particular and specific, or general, in accordance with military usage and discipline, though, even as to their acts, without, or beyond orders, they may be justified, if at all, by the common law right of self-defence, or resistance of actual outrage, or apprehension of offenders.

There are many cases (*b*) in which officers have been held

something monstrous in calling upon a man to act under one law, and then trying him by another. The controlling power of courts is what is only to keep them within their *jurisdiction* (*Grant* v. *Gould*, 2 Hen. Blackst. rep. 97.) Within the jurisdiction of martial law it is as much a law or rule, while it prevails, as any other special or peculiar law, and persons who act under it must be tried by it.

(*a*) It is so declared by Parliament, in the Irish Act, which allowed the exercise of martial law without declaring it, and whether or not it could be legally declared; distinctly affirming the common law prerogative of the Crown to declare it when it may lawfully be declared, *i.e.*, in a case of rebellion. It is there distinctly enacted, of the exercise of martial law under the *statutable* power, that, as stated in the text, the military were to be deemed justified by their orders, and it would be absurd to suppose that they would be left unjustified in acting on their orders under martial law, when declared by the common law power which the act expressly recognizes.

(*b*) As in the case of *Wall* v. *Macnamara*, 1 Term Reports, 536, and the cases there cited. Governor Wall, the plaintiff in that case, was afterwards hanged for flogging a soldier to death, but there a *murderous* intent was proved; and it was really a murder *under colour* of a sentence. So in a case cited by Heath, J. W. 4 Taunt. Rep. 70, where an action was brought against the officers of the Devon Militia for inflicting 1,000 lashes, in consequence of the sentence of court-martial for a pretended mutinous act, which was not mutinous at all. In that case, Heath, J., said that if the man had died under the lash, all the members of the court-martial would have been liable to be hanged. *Ib.* 77. But there were cases of *illegal* punishment under ordinary law, and merely under colour of military authority. So in *Frye* v. *Ogle*, 4 Macarthur on Court Martial, p. 269, the plaintiff had been guilty of no offence at all. (Laurence, J., 4 Taunt. 56). So in *Warden* v. *Bailey*, 4 Taunt. 60, where no mutinous expressions were heard, and no military offence committed; and it was in time of peace.

liable for flogging, arrests, imprisonments, or other punishments illegally inflicted, but then they have all been cases in which the persons so punished were not subject to their authority, either generally or in respect of the particular subject matter, or there was a felonious or malicious intent, and they were, moreover, all cases of regular military law, and not of martial law, properly so called.

It is to be carefully borne in mind (*a*), and is material for those who, in different ways, direct or carry martial law out, as well as for those who may be under it, that although the effect is to place the district under military government, even military government has its rules and usages; and, on the one hand, those who carry out martial law must not wantonly act contrary to those usages; and, on the other hand, if they do so, they are personally liable (whether at common law, or to military law), not those who merely directed them to carry out martial law.

For example, there are certainly two general and fundamental rules, which must be obligatory in the carrying out of martial law. The first is (*b*), that being, as the name

(*a*) That this is so, is known to every lawyer, and every officer, and every reader of works on military law or court-martial. These rules and usages no doubt, in time of war or rebellion, are not so precise and definite as in time of peace; but still there are rules and usages, as will be found expressed by the orders issued in the Jamaica case; as, for instance, (1) that no persons must act except under military orders, (2) that there must be no unnecessary or wanton cruelty, (3) that non-combatants are not to be injured; and to this it may be added, that the rules of natural justice are of universal obligation, except as far as an imperious present and overwhelming necessity precludes their observance.

(*b*) This appears an obvious inference or consequence from the very nature of martial law itself; for it implies the establishment of military government or authority, which is quite absolute. How, then, can any one be *entitled to* act under it (except as above stated) of his own mere motion, without any orders? There may be exceptions arising from the exigencies of military service, but they *are* exceptions; and the general rule, that in military service, no one must act without orders, is fundamental. This is as important for those who give as for those who *obey* orders; for those who carry out martial law, as for those who may be placed under it. For it is remarkable that few, if any, instances of excess or cruelty can be

implies, military government, no person (except only in self-defence, or resistance of actual violence, or arrest of known or suspected offenders,) is entitled to act under martial law except under military orders.

It may be safely laid down (*a*), that, in carrying out martial law, those great principles of natural justice, which are of universal obligation, must not be disregarded; and these appear to dictate that no man shall be put to death in self-defence, unless taken "red handed," nor without the most careful inquiry that can be made under the circumstances; though, as regards the latter, it must, more or less, as the proposition implies, depend on circumstances, and it does not follow that the officer, who fails to observe it fully, is culpable, or criminal.

It is to be observed that, although the effect of martial law is to put the district under military rule, and to render

found to have been committed under martial law, by military men, acting under military orders; those cruelties or excesses are generally perpetrated either by volunteers, or by private soldiers, without, or against authority.

(*a*) It is undoubtedly true that in cases of mere removal from an office —if there is a discretionary power of removal, as distinguished from one for good cause—it is not necessary to show a good cause, or to hear the party in his defence, because he has no legal right; and the discretionary power may be exercised on grounds quite apart from any fault or offence. But it is quite different in cases which affect life or limb; and it may surely be laid down, that even admitting, as is no doubt the case, martial law means an absolute discretionary military authority, that authority ought not to be exercised to the extent of putting one to death, or even of bodily punishment, except either they are taken "red-handed," or with such circumstances as amount to sensible, present proof (as muskets hot, hands blackened with powder, possession of arms, plunder, &c.), nor without hearing them in defence, and making the best inquiry possible under the circumstances. No doubt, the latter is a large qualification, and it is advisedly so stated, and, it is considered, necessarily so; because it must be borne in mind throughout, that the scope of martial law is not so much guilt, or guilty *intent*, as actual mischief and danger; and then it may be necessary, under pressure of military exigency, to execute or punish men without much inquiry, often without any, beyond hearing their defence, and looking at the circumstances. And it is conceived that whether under such circumstances there has been a culpable disregard of the principle, is a question for a military tribunal, unless there is evidence of malice.

all the population liable to be treated as soldiers, or even as rebels (*a*), it by no means follows, therefore, that they are all liable, indiscriminately, to capital execution, or for any summary punishment; and it remains a question, in each case, under the circumstances, what military exigency requires or justifies; though this, it is conceived, is a purely military question.

Under martial law, those engaged in its execution must act *under orders*, and under military authority. This principle, indeed, has a double aspect (*b*), and twofold application. It binds those who profess to act under martial law, and it is for the benefit and protection of those who are under it. For those who are under it must take care that (except as to self-defence, or resistance of actual violence, or arrest of offenders,) they act under military orders, and if they act without orders, or against orders, they act at their peril; for it is not everything done *during* martial law which is done *under* it.

(*a*) The proposition is differently stated. Simmons puts it, as "soldiers." General Nelson, the officer commanding in the field in Jamaica, put it, that they were *primâ facie* enemies. Probably both meant the same thing; and the difference is not substantial, when it is borne in mind that persons may be dealt with summarily under martial law, on the theory that they are soldiers, and in a state of war; and that, therefore, persons taken prisoners (as they certainly would not be if actively loyal, or in direct adherence to the Government), must, at all events, have been neutral; and in rebellion, and under martial law, neutrality is criminal. It is an offence even at common law to refuse to assist in putting down a riot or actual rebellion (*vide ante*), and under martial law, as, the mere *concealment* of a rebellious design is capital; the offence is, of course, far more serious, and is *primâ facie* proof of complicity in the rebellion, for loyal men always rally round the authorities on such occasions.

(*b*) It is as important for the protection of those who are under martial law, as for those who carry it out; for, on the one hand, military men are more conversant with military usages, and more under the control of a sense of what is due to the honour of their service, and less likely to be carried away by local resentment and partisan feelings, or temporary excitement, than armed civilians, who may be acting as volunteers. It is well known that most barbarities and cruelties, committed during martial law, have been committed by civilians or other volunteers. The fact is, military men are accustomed to the use of arms, and to the use of arms against armed men, and they are not unduly excited when called upon to act in the sup-

It is to be remembered that soldiers, or others acting under martial law, can only justify their acts by orders, or by self-defence, or the common law right to resist actual riot or rebellion. But soldiers have all the rights of citizens, whether under martial law or otherwise, in self-defence, or in resistance of riot or actual rebellion, and may kill any one *actually* engaged in felonious outrage, or in a felonious assembly, and refusing to disperse; or may arrest any one who has been guilty of felony, and who refuses to surrender. Apart from that, however, all persons acting in the execution of martial law must justify themselves by orders, either general or special, express or implied (*a*).

It follows, from these premises, that prisoners taken, unless liable to be shot at once, as taken red-handed (and that should be by order of officers), must be tried by court martial. Of course, if prisoners are made (*b*) as they must be

pression of rebellion; on the contrary, they have rather a repugnance to act except against men armed, and in the field. It is, therefore, exceedingly important, for the protection of the population, in a district placed under martial law, that no one should act except under military orders and under military command. To allow civilians to act without control is to open a dangerous door to revenge and retaliation, prompted by personal feelings or angry passions. In the Jamaica case, the commanding officers were fully aware of this, and issued very sensible orders on the subject.

(*a*) A soldier is gifted with all the rights of other citizens, and is bound to all the duties, and he is therefore as much bound to prevent a breach of the peace or a felony as any other person. If it be necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. (*Burdett* (*Bart.*) v. *Abbott*, 4 Taunt. 449. And see S. C. 5 Dow, 165; 14 East, 1, 254.) It is obvious that martial law must go further than this, for this is *common law*. But then, on the other hand, by military law, men can only justify themselves *by orders*. Hence it is that the exercise of martial law is always *under* military orders.

(*b*) Hence the Queen's regulations expressly provide that, no persons shall be kept in custody more than forty-eight hours without their cases being disposed of, that is, by their being released or tried by court martial. And though, under martial law, the Queen's regulations are not necessarily binding, this particular one is obviously applicable, *à fortiori* in a case of war or rebellion. (See the evidence of the Brigadier in command in Jamaica, given before the Royal commission, *post*.)

made, they must be disposed of in some way or other, and by some mode of inquiry, or they will speedily accumulate so as to hamper the military force in occupation of the country; the prisons being probably soon filled to overflowing, or perhaps no prison available, and the force required to guard them, or the provisions to support them, raising a case of military exigency. And they can only be disposed of, under military law, by court-martial.

The measures taken under martial law are of course military (*a*), for it is military rule which prevails; but they may range under one or other of these heads—they may either be executive, and operative, or of the nature of service in the field; or they may be *quasi* judicial, and be the administration of military justice under courts-martial. Both alike emanate from and are amenable to military authority alone, provided military orders are honestly given and honestly acted upon.

Courts-martial under martial law are as fully and as truly lawful tribunals (assuming martial law to have been lawfully declared), as the Courts of Assize (*b*). They are equally held under the authority of commissions emanating

(*a*) *Vide ante.* It is essential to bear in mind, in considering the means and measures adopted under martial law, that it is purely military, and under military authority. It is only incidentally, and as measures merely of precaution, to prevent mistakes, that anything which has the character of inquiry or judicial determination, is resorted to. There is no obligation to adopt any of the ordinary rules of common law, as to proof, or trial, or other matters of procedure. The only criterion is military usage, that is, the custom of the army in like cases. It is no law; it is arbitrary military rule and discipline, subject to natural justice.

(*b*) The Commissions of Assize are only temporary. The only difference between them and the Commissions under which courts-martial are held, is that the former are superior courts of regular character, whereas the others are of inferior and irregular character. In the former the commissions being directly from the Crown to the Judges, in the other being indirectly through the medium of the Commander-in-Chief of the forces, who issues his authority to other officers to hold courts-martial. But his commission, which carries with it authority to do so, emanates from the Crown, the fountain of all justice and authority, civil and military, and it is certainly true, that the courts-martial are as much *lawful* tribunals as any in the realm.

from the Crown; the commissions of Lord Lieutenant, Captain General, and Commander-in-Chief of any county, colony, or dependency, carrying with it authority to hold courts-martial, in these countries, under the Mutiny Act, and, abroad, by force of the royal prerogative.

The Petition of Right distinctly states that there may be summary executions by military law, and it is a matter entirely of military usage or of natural justice (*a*), how far and in what degree enquiry is necessary. As matter of military usage, those who are taken red-handed, as it is called, with arms in their hands, with muskets hot, or hands blackened with powder, or in possession of plunder, or the like, may be summarily dealt with.

As regards any acts of the governor, or any military commander, in sending a person under martial law before a court-martial for trial, it is too clear to admit of argument or doubt (*b*) that, whatever the result, the Governor or Commander cannot possibly be liable legally for it. For it

(*a*) The rules of natural justice are of universal obligation, and in no case ought a prisoner to be denied a hearing, however much appearances may be against the prisoner. Lord Hale points out how the recent possession of stolen goods, though raising a presumption of guilt, is not conclusive, and has led to false conclusions. But, on the other hand, when the presumption is against the prisoner, and he can give no explanation, nor vouch any one to prove his innocence, the analogies of common law would warrant the infliction of summary justice by martial law (*vide R.* v. *Burdett*, 4 B & Ald., as to presumptive proof.)

(*b*) Thus Lord Hale says, "If an indictment be found by a grand jury, the prisoner will not be bound to show probable cause, but the plaintiff will be constrained to show malice and iniquity in the prosecution." (*Saville* v. *Roberts*, 1 Lord Raymond's rep. 374.) The true grounds of these sorts of actions are the plaintiff's innocence, and the fact that it was not an honest prosecution of justice, and a mere mistake, but that it was done in downright malice, that is, wickedly and *without any cause*" (Parker, C. J., *Jones* v. *Gwyn*, 1 Wils. rep.). And if a court has convicted the party, it is impossible to maintain that the prosecution was without reasonable cause, even though the conviction be reversed on appeal, unless the court can be fixed with malice, and, even then, the prosecutor must also be fixed with it, in order to render him liable. (*Reynolds* v. *Kennedy*, 1 Wils. rep. 232.) If there is a conviction by a court, the mere approval of it by the Governor could not make him liable for it, unless there was a conspiracy.

is a well-settled and fundamental principle of our law that, no one instituting a prosecution is liable, even on an acquittal, unless the proceeding be on his part, not only without any reasonable cause, but also malicious and wicked. And upon a conviction he cannot be liable, for it is an act of the court.

And even as to regular and ordinary courts-martial (*a*), which have jurisdiction only over military persons and military offences, their proceedings are only subject to the control of the superior courts; for the purpose of preventing them from *exceeding* their jurisdiction, *i. e.* exercising it over persons or matters other than military; and the superior courts cannot interfere, if the courts-martial has kept within its jurisdiction, however erroneous.

It is undoubtedly true (*a*) that a soldier or officer is liable civilly or criminally for any act not legally justifiable, as, for summary arrests or executions not justified by common law, and *without* martial law, or for exercising military authority over persons not subject to it, either by reason of their not being military persons, or of martial law not having been declared; but that is quite different from a liability for obeying orders *under* martial law, or under ordinary military law.

(*a*) *Grant* v. *Gould*, 2 H. Blackstone's rep. 69. Thus, for instance, it is a question for the superior courts, whether a person is a soldier, or whether the offence charged is within the jurisdiction of the court-martial. (*Mann* v. *Owen*, 9 B & C. 595.) If the person is a military man and the offence is a military offence, the courts of law cannot interfere (Re Poe, 5 B. & Ald. and Re Mansergh, 1 B. & S.) This being so, even in regular courts-martial, conducted according to regular military law, under the Mutiny Act and Articles of War, *à fortiori* it is so of extraordinary courts martial, under the martial law.

(*b*) Thus an action lies for an inferior military officer against his superior officer (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority; although the imprisonment be followed by a trial by a court-martial. (*Warden* v. *Bailey*, 4 Taunt. 67. And see S. C. (in error), nom. *Bailey* v. *Warden*, 4 M. & S. 400.) In trespass against the adjutant of a regiment of local militia, for arresting and imprisoning a serjeant in the same regiment, upon a charge of unsoldier-like conduct, in exciting disobedience and

It has been held, however, that even in time of peace, and under ordinary military rule (*a*), there may be an offence against military law in mutinous or seditious words calculated to excite disaffection, even though spoken of orders, which in strictness the officer had no right to make.

To this it may be added (*b*), that the Mutiny Act, re-

mutiny; if the imprisonment be continued by the defendant, in pursuance of orders from the commanding officer of the regiment, the action lies; unless the continuance of it be justifiable on the part of the commanding officer; and such continuance was held to be justifiable where it was in order to bring the plaintiff to a general court-martial, for uttering words in the presence of several serjeants and others of the same regiment, amounting to disorderly conduct on the part of plaintiff, to the prejudice of good order and military discipline, within the 24th section of the Articles of War, art. 2, although the words uttered referred to an order made by the commanding officer, which he was not strictly competent to make, and although the plaintiff was acquitted by the sentence of the court-martial. *Ib.* Thus the court-martial had acquitted the plaintiff, yet a court of error held the defendant justified in arresting him, because there was reasonable and probable cause for the charge, and the plaintiff was under his authority.

(*a*) Thus, in the case just cited being carried to a court of error, it was held that the plaintiff having spoken mutinous words in the presence of other soldiers, was not the less liable to court-martial, because the order to which the words referred was not valid; for it was said, "there may be disorderly conduct to the prejudice of good order and military discipline in the manner and terms used by one soldier in dissuading another not to obey an order not strictly legal. If any erroneous order on the part of a commanding officer would not only justify the disobedience of it by the soldier, but would justify him in making inflammatory and reproachful public comments upon it to his fellow soldiers—is it possible that military order and discipline could be maintained? (*Bailey* v. *Warden*, 4 M. & Selwyn. rep. 410.)

(*b*) By the Mutiny Act, the king may make articles of war, and constitute courts-martial, with power to try and punish, as well in Great Britain, &c. as in Gibraltar, &c. By a subsequent clause no soldier shall, by such Articles of War, be subject to the punishment of death, or loss of limb, within Great Britain, &c. (omitting Gibraltar) for any crime not expressed to be so punishable by the act. Then, by the Articles of War, persons found guilty by a court-martial at Gibraltar, of theft, robbery, &c., or of having used violence, or committed any offence against the persons or property of others, "shall suffer death, or such punishment, according to the nature and degree of the offence, as by the sentence of such court-martial shall be awarded:—Held, that a court-martial had a discretionary power by such

stricting courts-martial to the capital offences enumerated in the act or the Articles of War does not apply abroad, where the Petition of Right does not extend, and there is no limitation of the royal prerogative in this respect, so that military persons under ordinary military law, or all persons under martial law, may be punished, even capitally, for offences not contained in that rule or the Articles of War.

When a Governor or Commander has put a man upon his trial by court-martial (*a*), even although he is *acquitted* of the charge, the Governor or Commander is not *legally* liable unless he *knew* that the man was not guilty; and if the court convict, he cannot be liable *criminally* in a court of common law, because the conviction is their act, not his, and they, on the same principle, even if legally liable at all, can only be so, if they knew him to be innocent.

words, and were not restricted to pass such sentence on a delinquent as would be warranted by the law of England. And that a return to a *habeas corpus*, stating that upon a charge against the defendant before such a court, for an offence alleged to have been committed by him at Gibraltar, such proceedings were had, that the court-martial, after hearing the charge and the defence, found the defendant guilty, and sentenced him to transportation for fourteen years, was good. (*Rex* v. *Suddis*, 1 East, 306.) That the Chief Commander in a colony can convene courts-martial (*vide Bradley* v. *Arthur* 6 B. & C. 292).

(*a*) This was the view upheld by the Court of Error, which decided in the case of *Johnstone* v. *Sutton*, 1 T. R. 503, in favour of the legal liability in such cases, and whose judgment was *reversed* by the Lords in the particular cases, therefore it represents the *strongest* view that could be possibly taken of legal liability in such cases. There the man was *acquitted*; and the court of error said that "the proposition that a Commander-in-chief had a privilege to bring an officer or soldier to court-martial for an offence which he *knows him to be innocent of*, and under colour of his power, is too monstrous to be entertained;" which may be, and yet he may not be legally liable, except upon a criminal information, or a court-martial, as the House of Lords seemed to think. The case supposed, however, was of a man *known to be innocent*. And the court go on to say that they are not prepared to say that a person who should indict another for murder, knowing that the other had a justification for the act, would be guilty of murder, because after all it was for the accused to set up the justification, and it was to be supposed that the court would give due effect to it, and if they did not, it would not be the fault of the prosecutor.

And it is a general principle (*a*) that whatever the amount of culpability involved in putting a man lawfully upon his trial (if the judges of the court are not unduly coerced) the person who has so put the party upon his trial cannot be legally liable for conviction by the court, however erroneous the verdict or judgment, or however defective the evidence; nor for the approval or execution of the sentence, unless, at all events, it is so apparent that there was no evidence that a conspiracy to commit an act of wilful and malicious injustice can be presumed.

In the same great case (*b*), it was also settled, that assuming jurisdiction, even after a person has been *acquitted*

(*a*) This was illustrated, in the strongest possible way, in the case of the miscreants who conspired together to indict and put upon their trial innocent persons for capital offences, which they themselves proved by false or perjured evidence; so that the innocent men, by this means, were thus actually convicted and executed; the object being to obtain rewards offered for conviction of offences. The wretches were indicted for murder and convicted, but the judges could not hold that it was murder, their act, guilty as it was, not being the direct cause of the convictions, seeing that the jury intervened. (See the case reported *R.* v. *Macdaniel*, 2 Leach.Cro.Cas.) This clearly shows that a Governor or Commander who did put upon his trial a person he *knew to be innocent* would not be guilty of murder, unless perhaps by reason of his execution of the sentence; but certainly not, unless he knew him to be innocent.

(*b*) "There is no similitude or analogy between an action of trespass or false imprisonment and this kind of action. An action of trespass is for the defendants having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." [That is assuming jurisdiction.] "The essential ground of the action is that a legal prosecution was carried on without a probable cause. From the want of probable cause malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice, however, the want of probable cause cannot be implied. A man, from a malicious motive, may take up a prosecution for real guilt, or he may from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action. Whether there was probable cause was a question of fact, and in a military case it must more or less depend upon military judgment and be open to a variety of opinions. And under such circumstances, if there are such facts as that military men in like circumstances considered the person liable, there is probable cause." (*Sutton* v. *Johnstone*, 1 Term Reports, 546.)

on a trial by court-martial, he cannot sue the Commander who summarily arrested and suspended him and put upon his trial, unless there not only was no reasonable and probable cause, but also malice or bad motive, and of course, *à mullo fortiori*, if the court-martial convicted *he* could not be liable at all, for the conviction is their act; nor they, because their function is judicial.

So large is the scope of military law (*a*), even in ordinary and regular military law in times of peace, and in this country, that it has been held, and by a court of error, that a person under military law may be liable to be put upon his trial before a court-martial for insubordinate conduct, or mutinous and seditious words, even directed against an order made without authority, and that, even although on that ground the person is *acquitted*, he has no legal remedy, because the seditious words or conduct would be probable ground for putting him upon his trial.

The Governor-General, or Commander, who sends a man to trial by court-martial, clearly is not liable, even on acquittal, still less on conviction, which is their act, not his. And the members of the court cannot be liable, for their duty is judicial, unless, indeed, there was no real trial at all, and it was merely colourable, and not very probable. The

(*a*) *Bailey* v. *Warden*, 4 M. & S., in a court of error, where the doctrines above stated were laid down under circumstances exceedingly strong. The commanding officer made an order he had no right to make, and a military person, in the presence of others, spoke in violent and disrespectful terms against it; he was put upon trial before a court-martial and acquitted: he then brought his action for his arrest, suspension, and imprisonment, on the voyage, but it was held that he could not recover, because although the order was illegal, his seditious words about it were sufficient *probable cause* for the prosecution. It follows that if the court-martial had convicted him of seditious and mutinous language, the conviction would have been legal; and, in time of war, it would have been capital. So that the decision of the court of error really came to this, that a person under military law may be convicted of seditious words, which in time of war is a capital offence, even against an order which is unwarranted by military law, the remedy of the party being to appeal to military law against it, not to use seditious language.

officers sitting upon courts-martial would be entitled to that immunity, within their jurisdiction, which attaches to inferior judges, and even to magistrates (*a*), in the execution of their judicial duties, especially in judging of the facts, and of the force and effect of evidence. It would not, therefore, matter how much they might honestly err, nor that they apparently convicted persons who afterwards turned out to be innocent, especially as they would not be bound by the strict rules of legal evidence.

Judges and jurors, in the regular courts of justice (*b*), are

(*a*) Justices of the Peace are not punishable *civilly* for acts done by them in their *judicial* capacity; but if they abuse their authority, they may be punished *criminally* at the suit of the King, by way of information, for regularly no man is liable even to an action for what he does as Judge. (Hawkins' Pleas, Crown, c. 8, s. 74.) If he acts maliciously, indeed, without a charge or information, he is liable (*Morgan* v. *Hughes*, 2 T. N., 228). But they can only judge on the facts laid before them, and if those facts give them jurisdiction they are not liable (*Lowther* v. *Lord Radnor*, 8 East. 173.) If when a charge is before a magistrate, he does not exceed his jurisdiction he is not liable to action (*Mills* v. *Collett*, 6 Bing. 93). It is for him to judge as to the effect of the evidence and the course to be taken (*Cave* v. *Mountain*, 1 M. & G.), and it is no ground for holding them liable, that they form an erroneous judgment upon the facts proved before them, or as to what facts were proved, or as to the mode of proving. No action will lie against a magistrate for anything done by him in the discharge of his judicial duty, without proof of actual malice or ill-feeling, or bad evidence (*Linford* v. *Fitzroy*, 13 Q. B. rep. 230.)

(*b*) In the case of Judges and jurors they are not liable, because the law gives faith and credence for what they do, and therefore there must always, in what they do, be cause for it, and there never can be any malice in what they do. The presumption of law is, that Judges and jurors do nothing causelessly and maliciously, which does not derogate from the principle that, where it can be shown that one man has *causelessly* and *maliciously* accused another of a crime, or has otherwise vexed him, by causelessly and maliciously exercising upon him, to his damage, powers incident to his situation of superior, the injured party is entitled to redress. The Commander-in-chief is in the situation of every other subject of the country; who, being put in authority, has responsibility annexed to his situation. And the proposition that he has the privilege to bring a man to trial for an offence which he knows him to be innocent of, is too monstrous (*Johnstone* v. *Sutton*, 1 T. R. 503). The latter proposition may be true, though it leaves the nature of his liability entirely open; and the House of Lords, in the same case, decided that, at all events, for acts done in time of war there is *no* legal liability, and the redress, if any, is by

beyond all doubt absolutely protected from any *legal* liability within their jurisdiction, however erroneous may be their verdicts or judgments, or unless, as regards Judges, these sentences are wholly illegal; and as the same general principle applies even to inferior Judges or mere ordinary magistrates, unless they act maliciously, it appears equally to apply to officers sitting upon court-martial; at all events, unless there is such an utter absence of any evidence as to show a wicked conspiracy to commit a murder under colour of martial law, a case happily hardly supposable.

When martial law has been lawfully declared, and persons have been convicted and executed by court-martial, the *onus* of proving that the proceedings were wrongful rests on those who assert it (*a*); for although no doubt, in the first instance, the *onus* was upon persons who take life, to justify it, they do so, by showing it was under lawful authority, and then the *onus* rests on those who impeach the proceedings; nor can this be done by merely proving the innocence of the persons convicted.

The legality of the conviction (*b*), by court-martial

the law military. So the House of Lords negatived the previous proposition, "that a Commander-in-chief (at all events in time of war), is in the condition of every other subject of the country, who, being put in authority, has responsibility annexed to his situation." For they held that he was not liable at law. The above, therefore, represents the *extreme* of the doctrine of legal liability, and it requires wilful injustice.

(*a*) If it were not so, no one would even venture to sit on a court-martial. There is nothing in which men's minds differ so much as in the judgment they form upon evidence; and if every officer who sat upon a court-martial had to satisfy a jury of the soundness of the verdict, it would not be safe to sit on a court-martial. Moreover, the strict rules of evidence are not binding on courts-martial under martial law, and thus they would act under one law and be tried by another, which would be contrary to the first principles of justice. It is a general legal principle, expressed by a legal maxim, that things done under lawful authority are presumed to be done rightly; and, assuming martial law to have been legally declared, and the court to have been lawfully assembled, it was a lawful tribunal.

(*b*) In no system of judicature, of which the author is aware, are Judges of any grade liable, merely because other persons consider they have decided on unsatisfactory or insufficient evidence, or because the persons they have convicted turn out to be innocent; and if this be not so

cannot possibly depend upon the *innocence* of the parties convicted, still less upon the *legal proof* of their guilt. The strict legal rules of evidence are not binding upon courts-martial under martial law, and if they were, to render the members of the court liable, if the guilt of the accused is not deemed to have been clearly proved, or even if their innocence is clearly established, would be to impose on those exercising this summary power a heavier burden of legal risk and peril than is imposed upon any tribunal under any other system of law.

If the proceedings of the court-martial were lawful and regular according to military usage, in like cases (*a*), that is in case of war, then, however innocent the men convicted may have been, it matters not as to legal liability; and, on the other hand, if the proceedings were unlawful, it matters not how guilty the accused may have been, their conviction was illegal.

Moreover, it is to be borne in mind that courts-martial unite in themselves the functions of *juries* as well as judges, in other words, they are, like justices, judges of fact (*b*), and they are, like justices, allowed to judge a good deal

under an ordinary system, when judges have ample time to consider, and the benefit of knowledge of law and the legal rules of evidence, how much less can it be so as to lay tribunals, acting on a great public emergency, under the pressure, perhaps, of military exigency, ignorant of the rules of evidence, and therefore not bound to administer them, and often unable to get legal evidence, and yet obliged to act summarily.

(*a*) So it is in all the analogies of common law. If a magistrate return a regular conviction, and the matter was within his jurisdiction, it is good in law, although he was utterly wrong, and it condemns to the ignominy of hard labour in a gaol a perfectly honest and innocent man. This has a hundred times been illustrated in cases of summary convictions in our courts. It need hardly be said, that if a trial for a capital offence be regular, the sentence is legally valid, though the man was innocent, and our law gives no appeal on the *facts*. On the other hand, it is clear law, that for a man without authority to kill a convicted murderer, under sentence of death, is murder. (Hawkins' Pleas, Crown.)

(*b*) Just as it has been often said, that Justices of the Peace exercise, in summary convictions, the functions of juries. And that juries have a very large and wide latitude allowed them by law, in regard to evidence of mat-

by matters of fact, on the part of the prisoner, the absence of denial or of explanation, or the faint tone of denial, as to matters put forward against him, and the like, which are matters not easily put upon paper or reducible to rules of formal proof.

Again it is to be borne in mind that, as martial law is not only military rule, but military rule in a state of rebellion, in which no neutrality is allowed (for subjects, even at common law (*a*), cannot stand neutral between a Sovereign and a rebellion), and sympathy with rebels is nearly an offence; positive, affirmative proof of complicity in the rebellion is by no means so necessary as at common law, and slight circumstances, coupled with the undoubted fact of neutrality, which of itself goes far to show sympathy, may not unreasonably suffice to satisfy military men under martial law.

ters of fact before them, is shown by many cases. Thus, on the other hand, they may disbelieve positive testimony on account of the demeanour of the witness (*Carstairs* v. *Stein*, 4 M. & S. 99), or their own general knowledge (*Rushforth* v. *Hadfield*, 7 East, 224), or they may be referred to their own general knowledge in matters in which they are conversant, without any formal proof at all. Nor is it at all clear, that as courts-martial in time of war are not bound by the legal rules, they may not, as Justices of the Peace may, ask questions of the prisoners; and if they may, sometimes a single answer, or refusal to answer, may be conclusive. At all events, the absence of explanation of circumstances, broadly suggestive of guilt or of suspicion, and requiring explanation, and the explanation of which would be in the prisoner's power to give if innocent, may even according to the common law be considered, coupled with any circumstances raising a presumption or probability of guilt (*vide R.* v. *Burdett*, 4 B. & Ald.).

(*a*) Nothing is more clear than that, at common law, it is not lawful to stand indifferent between the Sovereign and his subjects, in case of war or rebellion. It is an overt act of high treason to adhere to the King's enemies, and misprision of treason is a crime. So men may be indicted and punished for refusing to assist in putting down a riot when called upon to do so (*vide ante*, p. 29). The declaration of a state of rebellion is itself a call upon all loyal men to put it down; and it is notorious, that upon occasions of riot or rebellion, loyal men all rally round the Government, for the support of law and order; and the bare fact that a man does not do so, and stands aloof from the Government in such an emergency, as it may of itself be a positive offence, so it is always a matter of grave suspicion, and suggestive of complicity.

The weight or effect of this negative evidence (*a*) is, of course, greatly enhanced as regards persons of acknowledged influence, because the consciousness of that influence would lead them, if they were not implicated in the rebellion, to use it in support of law and order, and, therefore, their *not* so using it, but standing entirely aloof, is as strong a piece of evidence against them in common sense and reason, as can well be furnished to a tribunal, bound by no formal or technical rules of proof, and only bound to be honestly satisfied of complicity.

The truth is, that martial law is quite different from the common law, in its offences, its penal consequences, and its mode of proof, or manner of procedure. The effect of the lawful declaration of martial law, being to establish that law, in suspension and exclusion of the common law, it follows that there is no necessity (*b*), that the offences punished should be common law offences, still less that penalties inflicted should be common law penalties; least of all, that the offences should be proved by legal proof. And, therefore, it is not necessary that there should be the legal elements of the offence, as, for instance, a felonious intent, or a specific intent, or an intent to do a specific act,

(*a*) This, and all other points arising upon trial by court-martial under martial law, arose in the Jamaica case, especially with reference to the case of Gordon, which caused some sensation, and is, therefore, stated carefully in the next Part. He was a man of unbounded influence among the negro population, who had a residence in the district where the rebellion broke out, and had been for months, as a matter of fact, engaged with the active leaders, in exciting the people there to sedition; and though he was absent when the particular outbreak occurred, and at which the persons who were his personal and political enemies, and whom he had held up to execration, in a seditious proclamation, were massacred, by the active leaders, of the insurrection, he remained out of the district, quite neutral, for nearly a week afterwards, during which the negroes were in armed rebellion, doing nothing to induce the negroes to put an end to it. He was then arrested, and taken into the district, and tried, convicted, and executed, for complicity in the rebellion.

(*b*) If there were, then martial law would be the same as common law, whereas it is, as all are aware, something not only different but utterly the opposite. For common law is strictly limited by rule, whereas martial law is arbitrary, and has no definite limit, no formal rules.

which happens to have been committed. The true scope of it is, danger, and the removal of the danger, by striking terror into those who cause it.

This principle presents the key to the solution of all the questions that arise under martial law, as to the time to which it relates, or the matters or persons coming under its opinion, or the measures to be adopted. The first question that arises under martial law is, to the measures which may be taken, as, whether parties arrested may be tried by court-martial for offences previously committed (*a*), that is, if committed prior to the proclamation of martial law; and next, whether they may be arrested *out* of the proclaimed district, and carried *into* it, to be there tried for offences committed within it. All these questions turn upon the real object and character of martial law, and whether it is mere resistance of actual insurrection, or repression and prevention of rebellion, and restoration of order.

As regards the question of time, the state of war to which martial law applies, begins, as against those who raise it, when it is begun; and the declaration of martial law only recognises its existence, so that martial law applies to all offences committed in raising the rebellion.

As regards the question of locality, whether a person who has committed a crime in the proclaimed district can be arrested out of it, and brought within it, to be there tried for his offence there committed; it appears clear that he may be so dealt with, according to the analogies of common

(*a*) If not, then there will be this absurdity, that, though there may have been a cruel massacre, by hundreds of men, known or believed to be banded together for similar massacres, and far too numerous to be dealt with by ordinary law, they cannot be touched until they have committed further outrages, and perhaps sacrificed more lives; surely the *reductio ad absurdum* is enough. The object of martial law surely is, repression and prevention. If it is only resistance to actual outrage, then it goes no further than the right of self-defence or the common law right, and only of resisting actual felony, which does not require martial law at all. If the object is repression and resistance, there is no surer mode of effecting it, than striking terror by the execution of those who have already committed outrages.

law, under which it is a maxim that crime, or rather the trial of it, is local (*a*), and *must* be tried where it is committed, indeed, cannot be tried elsewhere.

Again, even according (*b*) to the strict rules of the common law, a man may commit a crime in a place in which he has never personally been, as in the case of a seditious publication, by sending it to a place where it is received, and read, and published, and does its mischievous work; or, in the case of conspiracy in one place, where the actual mischief is done at a distance.

(*a*) *Raphael* v. *Verelest*, 1 W. Blackstone's rep. Hence it was held that, a British subject, arrested abroad on a warrant upon an indictment for a misdemeanour, brought in custody to England, and there committed to prison, is not entitled to be discharged—Per Lord Tenterden, C. J., and Parke, J.; (*Ex parte Scott*, 4 M. & R. 361; 9 B. & C. 446.) Where the crew of a Dutch ship had mastered the vessel and ran away with her, and brought her into Deal, it was held that they might be seized and sent back to Holland. (*Mure* v. *Kay*, 4 Taunt. 43.) The truth is, that it is a fundamental principle that by action at common law, and apart from statutable or special law, causes can only be tried in the counties where they were committed. (See *R.* v. *Burdett*, 4 B. & Ald. 156.) It therefore required special statutes to provide for trial in cases of crimes committed abroad or on board ship, &c. (*vide* notes to *R.* v. *Corbett*, 4 Finlason's rep.). Therefore, if a person is implicated in acts of rebellion, which have been committed within a proclaimed district, he must be removed there to be tried, and must be tried (if at all) by martial law, for he cannot be tried elsewhere.

(*b*) It was once doubted whether a libel be triable in any county but that where the publication took place. (*Rex* v. *Burdett* (*Bart.*), 3 B. & A. 717; 4 B. & A. 95). But it is now held, that where a defendant writes and composes a libel in one county, with an intent to publish, and *afterwards* publishes it in *another*, he may be indicted *in either*. *Ib.* When a letter was enclosed in an envelope, and *received in the county of* M. open, accompanied with written directions for publication, as expressed in the envelope, this was evidence to go to a jury of a publication in M. The publisher of a public register received a letter, the letter itself containing expressions of the writer, indicative of his having sent it to the publisher of the register, for the purpose of publication—the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant. (*Rex* v. *Johnson*, 7 East, 65; 3 Smith). An information at common law for a conspiracy, for planning and fabricating false vouchers to cheat the Crown (which planning and fabrication were done upon the high seas), is well triable in M., upon proof there of the receipt, by the commissioners of the navy, of the false

Moreover, in conspiracy, one of the parties is liable for the acts of the others. Those who are parties to rebellious conspiracy are liable, even at common law, for acts done by others, in furtherance of it, at a time and place at which he was not present. And by martial law, strict legal proof is not necessary (*a*), and a seditious or rebellious conspiracy, whether or not it is connected with a murderous object, is capital.

Upon any other principle, it might be impossible to prevent the ringleader of a most formidable and murderous insurrection (*b*), except through the dilatory and doubtful process of common law, for he may carefully keep out of the proclaimed district, and avoid any act during martial law; and there might not be strict legal proof even to warrant an arrest, and in the meantime the insurrection may be spreading, and causing terrible loss of life, though it would be probably paralysed and put a stop to by his summary seizure and execution.

The scope of martial law is not guilt, but mischief and

vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person for payment, which he there received. (*Rex* v. *Brisac*, and *same* v. *Scott*, 4 East, 164.)

(*a*) Hence a man, under martial law, may be well enough arrested out of the proclaimed district for complicity in a seditious or rebellious conspiracy, which still exists, and which broke out and took its chief seat at a place where he never was, if it appear that his letters or publications caused it; whether or not he had the intent of inciting to the *particular* outrages, which happen to have been committed in furtherance of the rebellious object. For if he were privy to those, he would be indicted for them at common law, and the mere sedition, which is an offence by martial law, has produced the rebellion. And supposing, it is considered, that his conviction and execution will put a stop to a dangerous rebellion which he, in fact, has caused, and must have had in general contemplation, it matters not, under martial law, whether he had the intent of causing the particular outrages which happen to have been committed.

(*b*) The real head of it will probably be a man of too much craft and cunning to commit himself openly by any overt act, or by any writing which would have a treasonable or murderous intent. That he might leave to secret and oral communications which could not be proved, or, more craftily still, he might abstain from them, and rely on the effects of his exciting inflammatory publication on an ignorant and excitable race. And so long as

danger; and if a man has, by acts—which in law were done in the proclaimed district, though in his body he was never there in his life—actually caused the rebellion (*a*), and must have meant to cause it, though, perhaps, not in that particular way, or at that particular moment, when it may have exploded prematurely by accident, as he could be removed into that district and tried there, at common law, for the sedition; so he may be removed there and tried for it under martial law, by which it is capital.

In such a case the question would be, not whether a capital offence could be proved in a trial at common law, but whether an act could be proved reasonably, which would be a capital offence by martial law, and which, also, could reasonably be connected, by the relation of cause and effect, with the rebellion.

On the last occasion (*b*) on which the subject came before

he remained untouched, they (his deluded dupes) might still cling to a hope of success, or of renewing the struggle; whereas his prompt execution would at once deprive them of hope.

(*a*) A man who issues seditious proclamations, is, even at common law, deemed to have meant to cause a rebellion, whether, *in fact*, he meant it or not; on the reasonable principle that we can only tell men's thoughts and intents by their acts or words, and that they must be taken to mean what they say, and to intend the natural result of what they do. (*Vide R.* v. *Burdett*, 4 B. & Ald.) Then, that being so, the man might be indicted for rebellion at the place where he caused the publication, though he was never there in his life. And if martial law happens to be existing there, and the seditious publication caused the rebellion, which is its object, he is liable to be tried by martial law, though the rebellion may have been accompanied by acts which he did not contemplate or intend, or rather which it cannot be proved he intended. And further, the evidence to prove he did intend them, is not the strict proof which would be required at common law, and it need not appear to be the sole or direct cause. It would be otherwise, of course, if the acts were quite unconnected with the rebellion.

(*b*) On the occasion of the committee of enquiry into the measures taken for the suppression of the rebellion in Ceylon, Sir. D. Dundas was then Judge-Advocate-General, and in his examination (see Q. 5421), distinctly laid down the doctrine stated in the text. The effect of the proclamation of martial law upon the inhabitants generally, is to put them all under martial law, and that is quite different from ordinary military law, which is written law found in the Mutiny Act and the Articles of War. But martial law, properly so called, is not written law; it is unwritten law; it

Parliament, it was distinctly stated by the Judge-Advocate-General of the day, that the effect of proclaiming martial law, is to put the whole population under martial law, and that this is something more extensive than ordinary military law, which is written law contained in the Mutiny Act and the Articles of War, and is arbitrary in its nature. In short, that it is the establishment of a state of war.

On that occasion (*a*), after martial law had been put in force, in an English colony, these doctrines were distinctly brought before the committee of the House of Commons, not only by the evidence of the Advocate-General of the colony, but of the Judge-Advocate-General; and were deemed to justify the proclamation of martial law by a Governor in case of rebellion, and all measures which the military authorities deemed necessary in carrying out martial law.

It seems that the Governor can hardly issue any orders to the Commander of the forces, beyond a general order to carry out martial law for the suppression of the rebellion; nor can the Commander-in-Chief give any other than general orders to the General commanding in the field; nor he to the officers commanding particular detachments,

arises upon necessity to be judged of by the executive. Martial law comprises all persons, civil or military, and it is to be executed by those who have to execute it, firmly and faithfully, with as much humanity as the occasion allows, and according to their sense and conscience. (Parl. Pap.)

(*a*) The occasion of the rebellion in Ceylon, upon which a committee of enquiry was appointed, which took a great deal of evidence, comprising that of the Advocate-General of the colony, Sir. J. E. Tennant, Colonial Secretary, and Sir David Dundas, Judge-Advocate-General; and they all laid down the above doctrines. "The Governor may declare martial law upon a necessity, of which he is to judge." (Ev. of Selby, the Advocate-General, Q. 1361); at the time martial law was proclaimed, the Governor was in possession of the general fact that a rebellion had been kindled. The first step necessary to be taken was to suppress that rebellion; the next was to inquire into the causes of it. With the object of suppressing the rebellion, martial law was proclaimed. (Evidence of Sir J. E. Tennant, Q. 3346.) Sir D. Dundas, Judge-Advocate General, gave similar evidence; but it is singular that both he and the Committee fell into the twofold error of supposing that the Petition of Right, prohibiting martial law in

as it is necessarily so much a matter of military exigency and military discretion as to the measures to be adopted (*a*).

Martial law is, in short, the suspension of all law, but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service; with no fixed and settled rules or laws; no definite practice, and not bound even by the rules of ordinary military law (*b*).

In the exercise of the terrible powers conferred by martial law, it is conceived that there is an absolute discretion for the doing of anything which possibly could be deemed necessary or expedient, by the military authorities, for the carrying out its object; the complete suppression of the rebellion, the removal of the danger, and the restoration of peace and confidence. That is, not merely what a jury or any other tribunal might deem necessary, for it is a question

time of peace, had any application out of the realm, or that, even within the realm, a state of rebellion is a state of peace. Mr. S. Wortley, however, put the whole question on its right basis, when he observed, "martial law is the *declaration of a state of war*."

(*a*) Thus, in the Ceylon case, the Governor, Lord Torrington, upon the breaking out of a rebellion, and proclaiming martial law, did not feel himself able to do more than give general orders to the officer commanding in chief, to carry out martial law, leaving it to him to take what measures he might think necessary. (Ev. of Sir J. E. Tennant, before the committee on Ceylon, 1850; Q. 3346.) "Lord Torrington was not in a position to give instructions of any kind to the military commanders. He did not take upon himself to do so; but adopted the general measure of proclaiming martial law, having confidence that in the hands of the officer, to whom was entrusted the carrying of it out, it would be carried out with every precaution." So in the Jamaica case, 1865, the Governor, upon declaring martial law, left the carrying of it out in the hands of the General-Commanding-in-Chief, who, also, at first gave only general orders to the General in the field.

(*b*) When martial law is proclaimed, there is no rule or law by which the officers executing martial law are bound to carry on their proceeding. (Ev. of Selby, Advocate-General, before committee of enquiry on Ceylon, 1850, Q. 6363.) "When martial law is proclaimed, the law is the will of the ruler, or rather the will of the ruler is law. So the evidence of the Judge-Advocate-General: "There is no practice laid down for martial law; it

purely military, to be decided at the moment by military authority; but anything which military authority could possibly deem necessary under any circumstances (*a*).

The view of martial law supported in these pages has been officially laid down (*b*) within the last few years, and by the highest official authority on the subject, the Judge-Advocate-General, in a paper laid before a Royal Commission, and by that Royal Commission laid before Parlia-

must be executed by those who have to execute it, firmly and faithfully; with as much humanity as the occasion allows of, according to their sense and conscience." *Ibid.* It overrides all other law. "It is entirely arbitrary; it is far more extensive even than ordinary military law." *Ibid.*

(*a*) This seems logically to follow from the very nature of martial law, the establishment of absolute discretionary military authority, which is the view evidently taken of military authority, in a state of war, by the highest legal authorities. (*Vide* the judgment of Lord Mansfield, in *Sutton v. Johnstone*, 1 T. R.; and see the ruling of the court in *Wright* v. *Fitzgerald*, 27 St. Trials); and if so, then, by this authority, it must include anything which the military commanders at the time being deemed necessary, unless it were something which, in its nature, they could not have deemed necessary; as wanton cruelty to non-combatants. This is evidently the view which was taken by Sir D. Dundas, the Judge-Advocate-General, at the time of the Ceylon Enquiry, 1850, for, after stating that martial law was far more extensive and arbitrary even than ordinary military law, and is not bound by written laws or formal rules, said, "I can conceive of cases in which something might be done in *which no necessity could possibly justify*, as the torture of a child." (Report of Committee of Enquiry, 1850, Q. 5448.) He evidently implied in the whole tenor of his evidence, that, if it was something which might possibly be necessary, it was within the discretionary power involved in martial law; because, of that necessity, the military authorities would have to judge.

(*b*) Letters of the Judge-Advocate-General, Nov. 25, 1859, in answer to questions put by the Royal Commissioners for National Defences. "There is a broad distinction between martial law, called into existence by a proclamation of martial law, and the law administered by courts-martial for the ordinary government of the army, which for distinction and accuracy may be called military law. The latter, namely, military law, is applicable only to the army, and to such other persons connected with it as are made amenable to military law by express enactment. This law is partly written and partly unwritten. The written portion of it is comprised in the annual Mutiny Acts and the Articles of War issued under them, the provisions of which, like those of the ordinary law of the land, have been divulged and ascertained by a series of decisions given by competent authorities. The unwritten portion of it is founded on established usage,

ment, and it is conceived that it is too clearly the law to admit of any doubt in the mind of any one who has been at the trouble of tracing the history and the authorities of the subject.

The effect of the proclamation or declaration of martial law (*a*), according to this high authority, is to establish an absolute arbitrary military authority over the district, the will of the superior commanding officer; a power quite different from the ordinary and regular military law, and amounting, in fact, to an authority to take any measures he may deem expedient.

and is recognised by the legislature under the term 'custom of war.' The former, namely, martial law, which is the subject of the present enquiry, is so arbitrary and uncertain in its nature, that the term 'law' cannot be properly applied to it."

(*a*) "Martial law, according to the Duke of Wellington, is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all, therefore, the general who declares martial law, and commands that it should be carried into execution, is bound to lay down the rules, regulations, and limits, according to which his will is to be carried out. The effect of a proclamation of martial law, is a notice to the inhabitants that the executive government has taken upon itself the responsibility of suspending the jurisdiction of all the ordinary tribunals for the protection of life, person, and property, and has *authorized the military authorities to do whatever they think expedient for the public safety*." (Letters of Mr. Headlam, Judge-Advocate-General, 25th Nov. 1859, cited in the Appendix to the Report of the Royal Commission on National Defences, p. 90.)

PART III.

OF MARTIAL LAW, AS PRACTICALLY ILLUSTRATED.

ALL this was lately illustrated in the recent case of the rebellion in Jamaica (*a*), which from the attention it excited, and the circumstance of its having been made the subject of a Royal Commission of Inquiry, will probably be long referred to, as an authentic illustration of martial law. That case illustrated all the questions that can possibly arise with reference to martial law.

All the points which are ever likely to arise with reference to martial law arose, and were illustrated and elucidated, in that recent and remarkable case; that is, as to the necessity for the declaration of martial law, or for its continuance, or to its effect, and the powers it confers, or, as to the orders to be issued, as to the means and measures to be taken, and, in particular, as to the mode of dealing with prisoners, and as to proceeding by court-martial.

With reference to the first and fundamental point, the

(*a*) This was the first occasion on which the declaration and execution of martial law has received official and authentic illustration, by the publication of all the reports, orders, and despatches, and all the official documents, the proclamation of martial law itself, the orders issued under it, the reports of the officer engaged in carrying it out, describing the measures taken, the despatches of the Governor, setting forth the grounds on which he had acted, the despatches of the Secretary of State, commenting upon all the proceedings; and all these form a body of official and authentic information on the subject, which has never yet been obtainable, and which, therefore, has been largely embodied in this part of the work, for the purposes of practical illustration.

necessity for the declaration of martial law, the case of Jamaica was an illustration of that kind of case which has already been pointed out as the most likely to give rise to such a necessity, from the peculiar condition of its population (*a*), in which a small white community were surrounded by, or rather scattered among, an overwhelming mass of a coloured race, for the most part belonging to a particular class, the peasantry.

The case of Jamaica was also an illustration of what has been already pointed out, that in the character or conditions of a large class of the population (*b*), and the existence among them of a general feeling of disaffection and predisposition to rebellion, there may be the strongest grounds for apprehensions of the spread of a rebellion, by reason of the sympathy of race, and the bands of union, arising from common instincts and feelings, quite apart from any actual combination or conspiracy.

It would be all-important to consider any information conveyed to the Governor, of any general indications of such a spirit, in the refusal of taxes or otherwise (*c*), and

(*a*) By the census it would appear that the white population was not above 15,000, while the blacks were about 400,000, and the ordinary military force in the colony barely numbered 1000 men, of which many, and all the police, were blacks. And this land, besides being of great extent, 170 miles by 40, 50, or 60, was in a great part covered with mountain and forest, and bush, difficult of access, and affording great means of concealment and defence to a rebel race.

(*b*) It has already been observed that, the most disastrous insurrections mentioned in history, have been cases of the rising of a race or a class, among whom there has been little or nothing of previous combination or conspiracy, but among whom smouldering feelings of animosity, enkindled by a casual spark, have burst forth into a flame which has spread like lightning. The massacre of the whites by the blacks in Hayti, was probably an illustration of this, for there was little trace of any actual conspiracy or organization; the truth is, that in such cases there is little necessity for it, where the natural instinct, and the sympathy of race and class, afford a far stronger and more certain bond of union, so that each man is certain of the co-operation of the whole mass, if only the insurrection gets to a head.

(*c*) It was notorious that there existed in Jamaica a general feeling

the existence of any general feeling or desire for a particular object, among that class of the population, likely to be worked upon or made use of, for the purpose of agitation or sedition, and the excitement of disaffection.

The necessity for the declaration of martial law on the occurrence of any outbreak, in such a case would depend on the materials for judgment, presented in the information conveyed to the mind of the Governor (*a*), as to the more remote or more immediate causes of the outrage, and especially as to the state of feeling among the most numerous and most dangerous class of the population, and the antecedent probability that the outbreak was the outbreak of a rebellion, or was likely to extend into rebellion.

among the blacks, that they were entitled to the waste or back lands, rent free, and the land taxes had been refused, as well as rent, on that account.

(*a*) Thus, the Governor of Jamaica, some months before the outbreak, had received such official communications as the following, from the "Custos" of a large parish, answering to the Lord Lieutenant of an English county:—"St. Elizabeth, July 22, 1865.—Your Excellency,—I think it my duty to inform your Excellency, that the minds of many persons in this parish are distressed by rumours of intended disturbances by the negroes; among these the resisting the payment of taxes, and the appropriation of lands to their own use, is said to be their every-day conversation. I enclose a letter from a highly respectable coloured gentleman, a magistrate. I have been spoken to by several of the peasantry and coloured people, but I cannot arrive at any certain information. I believe many of the black proprietors do intend to withhold the payment of the August tax; if so, the enforcing the law by levy would very likely create disturbance. I am told the chat among the negroes is 'Buckra has gun; negro has firestick' That a large portion of the people do not participate in this bad feeling or evil intention, I believe. But it appears to me quite necessary that a strong hand should at once arrest a spirit now abroad, and which requires to be compelled to fear the law, and respect the rights and security of the community. Your Excellency may consider it necessary to have it understood that the peace is not to be broken, and perhaps serious loss of property and life follow, and to have it seen that means are at hand to put down any attempt at seditious commotion. But, to put a stop to any attempt to carry out these intentions, if they exist, it might be worthy of consideration, the presenting before the people some force to punish and put down an *emeute*." There were many similar communications; and there were many statements as to words which had been heard uttered by negroes, as to a "war," which was to break out in October, rumours of drilling, arming, secret oaths, &c.

And, in considering the course taken by the Governor in such a case, either in declaring martial law, or continuing it after actual outrage and insurrection had ceased, it would be necessary to look at the materials for judgment presented to his mind at the time, by the information then conveyed to him (*a*), especially as to the existence, among that large and powerful class of the population, of a deep-seated and widespread spirit of rebellion, ready to break forth, and likely to render a rebellion, if allowed to break forth, formidable, if not fatal.

It would be very important to consider whether there was any person or man of great influence among the negroes (*b*), who had issued any inflammatory and seditious addresses to the coloured people, indicating a design or desire on his part to excite and urging them to rebellion.

(*a*) The foregoing is only a specimen of the communications received by the Governor on the subject. Here is another letter from Mr. Raynes W. Smith, a member of Council:—"There is undoubtedly a spirit of disaffection abroad, and the casual remarks dropped here and there lead to a conviction that many of the people are ripe for mischief. People from St. James's and Trelawney have been observed riding backwards and forwards in the parish, and Dr. M'Catty informed me of a night meeting having been held in Santa Cruz mountains, at which seditious and threatening language was used. That gentleman, from his profession, has peculiar advantages for obtaining accurate information of the state of feeling existing in this and other parishes, which he describes to me 'as not to be disregarded.'"

(*b*) There was, it was well known, such a person, one Gordon, a man of unbounded influence among the negroes, who had two months before issued a seditious proclamation, which had been since in circulation, and tended directly to excite the negroes to rebellion, blending adroitly local with general causes of discontent, and especially holding up to execration his political opponent:—"State of the Island.—Public Meetings.—St. Ann's Bay—St. Thomas ye East.—People of St. Ann's; Poor people of St. Ann's; Starving people of St. Ann's; Naked people of St. Ann's; You who have no sugar estates to work on, nor can find other employment, we call on you to come forth. Even if you be naked, come forth and protest against the unjust representations made against you by Mr. Governor Eyre and his band of custodes. Yo don't require custodes to tell your wocs; but you require men free from Government influence—you want honest men—you want men with a sense of right and wrong, and who can appreciate you. Call on your ministers to reveal your true condition, and then call

So it would be most material to consider whether there had been a continued distribution or circulation of such seditious publication, all emanating from the same quarter, and showing a settled, persistent, system of agitation, calculated, and, therefore, presumably intended (*a*), to excite the large and dangerous class to whom they were addressed, to rebellion (*b*).

on heaven to witness and have mercy.' People of St. Thos. ye East, you have been ground down too long already; shake off your sloth. Prepare for your meeting. Remember the destitution amidst your families and your forlorn condition; the Government have taxed you to defend your own rights against the enormities of an unscrupulous and oppressive foreigner, Mr. Custos Ketelholdt. You feel this, and no wonder you do; you have been dared in the provoking act, and it is sufficient to extinguish your long patience. This is not the time when such deeds should be perpetrated; but as they have been, it is your duty to speak out, and to act, too! We advise you to be up and doing on the 29th, and maintain your cause, and be united in your efforts; the causes of your distress are many, and now is your time to review them. The Custos, we learn, read at the last vestry the despatch from Mr. Cardwell, which he seemed to think should quiet you; but how can men with a sense of wrong in their bosoms be content to be quiet with such a reproachful despatch as this? Remember that he only is free whom the truth makes free—you are no longer slaves but free men; then, as free men, act your part on the 29th. If the conduct of the Custos in writing the despatch to silence you be not an act of imprudence, it certainly is an attempt to stifle the free expression of your opinions. Will you suffer this? Are you so shortsighted that you cannot discern the occult designs of Mr. Custos Ketelholdt? Inhabitants of St. Thomas in the East, you have been afflicted by an enemy of your peace—a Custos whose views are foreign to yours." The worst passages were kept in circulation.

(*a*) *Vide ante*, p. 68.

(*b*) Thus, a few weeks before the outbreak, the following was found posted about St. Thomas in the East, the words, it will be observed, being virtually taken from the proclamation which had been previously issued by the supposed author of the rebellion:—"People of St. Thomas in the East and St. Ann's, be up and doing: you have been too long ground down by an overbearing and oppressive foreigner; you have been taxed for and robbed of the small-pox money by the Custos, and the Rector, and Victor Herschell." The above was found stuck on a cotton-tree on the main road, opposite the house of one Chisholm (an active leader, and an associate of Gordon), in August, 1865. And the persons here mentioned—opponents of Gordon—were murdered in the first outbreak.

Then (*a*) it would be an important consideration that for some months before the outbreak (*a*), meetings had been held (*a*), at which a coloured person of great influence had made seditious addresses, in one at least (*a*), of which, he had incited the negroes to rise, and massacre the whites.

The Governor, of course, could only act upon the representations he received; and the first official account was from the "Custos" of the parish, who would answer to the Lord Lieutenant of a county, who wrote (*b*) to the Governor,

(*a*) Thus, at one meeting, he told the blacks to do as they had done at Hayti. The words, as published at this time, were:—"Why don't you do what Hayti does." [On the 21st June, 1793, three thousand negroes entered the capital city of Cape François, and perpetrated an universal massacre of white men, women, and children.] On this occasion, Gordon also said:—"The Governor's a bad man, and sanctions everything done by the higher class for the suppression of the poor negroes." The context and whole character of the speech showed that the allusion to Hayti, meant the extirpation of the whites by the blacks, as their oppressors. "The Governor is a bad man, he sanctions everything done by the higher class to the oppression of the poor negroes; now, my friends, a few words as to the rates of wages, and how you are taxed by your employers. The money that is said to go for the cultivation of the properties goes into other ways. The people in Vere are in a very low state, and very much oppressed. Educate your children, and in time they will be able to take the leading parts in their country. What is to become of you as a people? What is to become of your children? I was told by some of you, that your Overseer said, that if any of you attend this meeting, he would tear down your houses; tell them that I, George William Gordon, say they dare not do it. It is tyranny, you must do what 'Hayti' does; you have a bad name now, but you will have a worse then."

(*b*) "The Costos of St. Thomas in the East to the Governor's Secretary.—Morant Bay, October 10, 1865.—Sir,—I deeply regret that it is my duty to bring to the notice of his Excellency the Governor, that a serious outbreak among certain of the labouring population in this neighbourhood is threatened, and, in fact, has already commenced. The facts are simply these:—A number of over 150 men armed with sticks, and, preceded by a band of music, came on Saturday, the 10th October, with the openly expressed intention to rescue a man who was that day to be tried for some offence, if found guilty. Leaving the band of music outside the town, they proceeded to the Square in front of the Court-house. A man having been ordered into custody on account of the noise he was making in the Court-house, a rush was made by a body of the men referred to, and the man rescued from the hands of the police, one of whom was left with his finger

describing a desperate outrage upon justice, and informing him of the apprehensions entertained of an attack from the rebels, and requesting the assistance of a military force, stating that the civil force was quite inadequate. The account showed what evidently was a designed and deliberate outrage, with the intention of resisting justice.

Upon receiving this account, the Governor (*a*) at once demanded military assistance in aid of the civil force, and for the protection of the magistracy; which, however, so speedy was the progress of the insurgents from riot to open rebellion, was too late to prevent a sanguinary attack upon the magistracy, and a small civil and military force they had for their protection.

broken, and several others beaten and ill-treated. In consequence of this outrage, warrants were issued, yesterday, against twenty-eight individuals who had been identified, and the warrants placed to-day in the hands of six policemen and three rural constables, for execution. On, however, the attempt being made by this force to arrest one Paul Bogle, I am informed by the policemen who have just returned, that on a signal being given, a body of over 150 men, armed with cutlasses, bayonets, and pikes, appeared and made prisoners of three of the policemen, on two of whom they placed handcuffs, and only suffered them to leave after having obtained an oath from them, that they (the police) would join them. The oath was administered by Paul Bogle, on a Bible he had. The statement of the police is to the effect, that the people openly declare that they would come to Morant Bay to-morrow. I may add, that for fear of overstating the case, I name 150 as the number of the men engaged in the outrage of this day, but the evidence I have received while writing this despatch, leaves no doubt in my mind that the number was far greater. The Police, and the Morant Bay Volunteers, have no powder. I cannot hesitate, under these circumstances, to submit that it is very probable that, without some military aid, the force at the disposal of the authorities will, in the event of the people carrying out their threats, be insufficient to uphold the law, and in that case the worst consequences must be anticipated.—I have, &c., (Signed) M. A. Von Ketelholdt. P.S.—6 p m. The shells are at this moment blowing to collect men all through the Blue Mountain Valley, and through Johnston. I am of opinion that no time ought to be lost in despatching a sufficient military force.—M. A. Von Ket."

(*a*) "Governor Eyre to Major-General O'Connor, King's House, October 11, 1865.—Sir,—I have the honour to acquaint your Excellency, that information has just reached me, that a serious disturbance has occurred in the neighbourhood of Morant Bay, by a party of over 100 to 150 men

In considering whether there was a deliberate and designed attack, the Governor would consider all the surrounding circumstances, especially as to the conduct of the leaders of the outbreak, who at the same time sent to the Governor a letter (*a*), giving a false account of the matter, as indicating that they had in contemplation what followed, and were seeking excuses and pretences for it, and had brought themselves designedly into collision with the law, with a view to outrage justice, and provoke its action against them, with the design of resisting it and setting it at defiance.

The view taken by the Governor of these outrages (*b*),

armed with cutlasses, bay nets, and pikes. It is necessary that the most prompt measures should be taken to put down this resistance to constituted authority, and I have the honour to request your Excellency will be pleased at once to detach 100 men to be removed to the disturbed district. I have requested the senior naval officer to provide conveyance for these troops, if possible, in a man-of-war, and I trust that arrangements might be made to embark them in course of the day, as, if possible, the steamer ought to leave with them without delaying time. It is stated that rioters 'will come to Morant Bay to-day.'—I have, &c., (Signed) E. Eyre."

(*a*) For instance, the fact, that on the day of the original outrage the leaders sent an insolent letter to the Governor, falsely representing that they had been attacked and were forced to stand on the defensive, evidently in order to supply by anticipation a pretext for the further violence they contemplated. The letter ran thus :—"When on Saturday, the 7th of this month, an outrageous assault was committed upon us by the policemen of this parish, by order of the Justices, which occasions an outbreaking, for which warrants has been issued against innocent parties, of which we were compelled to resist. We, therefore, call upon your Excellency for protection, seeing we are of Her Majesty's loyal subjects, which protection, if refused, we will be compelled to put our shoulders to the wheel, as we have been imposed upon for a period of twenty-seven years, with due obedience to the law of our Queen and country, and as we can no longer endure the same; therefore is our object of calling upon your Excellency, as Governor in Chief and Captain-General of this island." This was signed by P. Bogle, J. Bouie, J. M'Laren, Cameron, &c., and fifteen others. The messenger who took this letter would not wait for any answer, and it is obvious that it was not intended to elicit one, but merely as a pretence.

(*b*) "I am induced to hope that the present disturbance, magnified into an insurrection, will be speedily checked by the prompt measures your Excellency adopted." (General O'Connor to Governor Eyre, Oct. 12, 1865. Papers, Part 1, p. 83.)

would depend upon the opinions he formed as to the probability, from the circumstances of the population, that insurrection, if not checked, would speedily develope into rebellion; and his letter showed a truer sense of the danger of the *spread* of the insurrection, and the importance of preventive measures, to prevent a rebellious spirit from breaking out into insurrection, which, if it once made head, might be fatal (*a*).

The correctness of the view he at first formed of the outbreak would be tested (*b*) and established by the speedy

(*a*) "With you I trust that nothing very serious will take place; but prevention is better than cure, and I fear that if an insurrectionary spirit were once allowed to make any headway, it would be more general and uncontrollable, and might cause a vast amount of trouble and expense before it was put down. There is, undoubtedly, an uneasy spirit, almost amounting to disloyalty and disaffection, in some of the districts, which has recently been formed and stimulated by evil-disposed and ill-judging persons at the so-called Underhall meetings, which have taken place in various parishes, and nothing but the utmost vigilance and the promptest action on the part of Government will prevent these smouldering embers bursting into flames; and then, as you know, the physical features of the country, and the almost unaccountable position of a large number of the people, would make it very difficult to deal with an outbreak on a large scale, or in several different localities at once." (Answer of Governor Eyre.) This, be it observed, was before the intelligence of any actual outbreak into murderous acts of rebellion, and was a remarkable proof of the Governor's prescience. Unhappily the intelligence of such acts arrived almost immediately.

(*b*) "Despatch of Mr. Davidson, J.P., to the Governor, of same date. The people at Morant Bay have risen and burnt down the Court-house, released all the prisoners, murdered several of the whites, Mr. Cook, the Clerk of the Peace, Mr. Walton, a magistrate, &c." The letter further stated that it was the intention of the people to go up the valley and onwards in that direction:—"Captain De Horsey, R.N., to Governor Eyre, "Wolverine," at Morant Bay, October 12, 1865.—Sir,—I regret to have to inform your Excellency that the disturbance you apprehended at this place has occurred, and with sad results, about twenty-eight men, including the Custos of the parish, having been brutally murdered, and the Court-house burnt by the rioters. The company of the 1st West were immediately landed, and as the attack on the town is expected to be repeated to-night, I am landing a party of 114 men from this ship to co-operate with them in preserving order. The 'Wolverine' will return to Port Royal to-morrow morning at daylight, conveying those of the white inhabitants who desire to go to Kingston, and

occurrence of worse outrages, and an attack upon the magistracy, when assembled in session; and his view of the nature and character of this outbreak as indicating rebellion, would greatly depend upon its character and circumstances, and especially upon whether, from the numbers engaged in it, and their being armed and previously assembled, it would appear to have been a deliberate and designed attack by a large and armed body of men, such as savours of rebellion, and whether it appeared likely to be carried out by further and similar outrages.

No other description could possibly be given to it than that it was a rebellion, and that these were the acts and outrages of a body of armed rebels (*a*), and it was so described at the moment in military reports, as well as in the reports of civilians.

The official accounts (*b*) received by the Governor could

with the object of bringing here any further troops your Excellency may deem to send."

(*a*) "Colonel Hunt to Governor Eyre.—King's House, October 20, 1865. —Sir,—It is my most painful duty to report to your Excellency that almost the whole of the No. 1 Company of the St. Thomas in the East Rifle Volunteers have been cut to pieces by the rebels, after a most gallant and determined resistance to the attack made on the Court-house at Morant Bay. The Volunteers were only twenty-two in number, and were opposed by a mob of between 400 and 500 armed rebels, and fought to the last with the utmost bravery. I regret I cannot herewith append a correct return, being unable at present to obtain correct information regarding the few survivors; but I can state that the whole of the officers, viz., Captain Hitchins, Lieutenant Hall, and 2nd Lieutenant Reid, fell at their posts, fighting gallantly to the last against overwhelming numbers.—I have, &c. (Signed) Robert W. B. Hunt."

(*b*) Statement of Mr. S. Cooke:—"October 17, 1865.—In obedience to the command of his Excellency the Governor, I beg leave to state as follows:—On Saturday, the 7th day of October, 1865, while the Court of Petty Sessions was proceeding with the business of the Court, the proceedings were interrupted by one Charles Geoghegan. The Justices presiding ordered the offender to be brought before the Court. The instant the order was given the party attempted to make his escape, but was captured on the steps of the court-house. Paul Bogle and two other persons rescued the prisoner and ran down the steps of the Court-house with him, where they were met by upwards of 100 persons with sticks; the prisoner was success-

leave no doubt in his mind that there had been an organized design for an armed attack; that there had been a previous deliberate attack upon the police by a large band of men already assembled, armed, and organized, for the purpose, and that there was a continuance of this lawless course, and that there was a deliberate rebellious and felonious attack, by an armed body of men, upon an assembly of the magistrates, and upon volunteer troops, drawn up to protect them, and a dreadful massacre of the principal magistrates and officers, except one or two who escaped (*a*).

fully rescued, and carried off, not, however, before the police were severely beaten and ill-treated. On Monday, the 9th of the said month of October, by order of the presiding Justices, Messrs. Walton and Bowen, I issued a warrant for the apprehension of Paul Bogle and the other rioters. There were seven policemen and five constables despatched to execute the warrant, none of whom, to the best of my knowledge, returned before the following day. Two of the policemen who were sent to execute the warrant informed me on their return, that as soon as the warrant was read to Paul Bogle, and the police attempted to capture him, a horn was immediately blown, and about 200 people appeared out of Paul Bogle's chapel and an adjoining canepiece, and captured two of the policemen and one constable, the others making their escape; they were handcuffed and taken into Paul Bogle's house, who threatened them that if they would take an oath to join them against the whites, they would spare their lives, if not, they would be murdered, to which they consented, and the oath was duly administered to them by Paul Bogle." This was not written until after martial law was declared, but the effect of it was known, and it implies that it was known by the Governor. The rest of it described the massacre.

(*a*) "Sergeant Mc Kenzie to the Hon. E. Gordon, Police Office, Morant Bay, October 12, 1865.—Sir,—It becomes my painful duty to report to you, for the information of his Excellency the Governor, an account of the anticipated disturbance likely to arise between the authorities of the parish and the peasantry. The No. 1 Company of Volunteers were ordered down from Bath, and were embodied with a few of the No. 2 Company, and were under arms at the court-house during the sitting of the Vestry, Wednesday, the 11th of October, 1865, about half-past 3 p.m. At this time the peasantry in a large body came into the town, first attacked the police-station, and took possession of the arms, the police at the time being at the court-house. The mob then advanced to the parade, where the volunteers were drawn up. His Honour the Custos began to read the Riot Act, the mob advanced close to the volunteers, when the volunteers fired, and some of the mob were killed. The following gentlemen were killed:—His Honour the Custos, Inspector Alberga, Justices Walton and A. B. Cooke, Rev. Victor Her-

The judgment which would be formed by the Governor, as to whether the outbreak was the outbreak of a rebellion, would in some degree depend on the information (*a*) conveyed to the Governor at the time, as to whether the outbreak was connected with, and the result of the head and origin of that system of agitation and sedition which had for some time prevailed, under the auspices of a person of intelligence, and influence with the class of the population among whom the outbreak had occurred.

The circumstances under which the Governor acted were stated (*b*) by him, in an official despatch he wrote a week

schell, Captain Hitchins, and Lieutenant Hall, No. 1 Company Volunteers, Mr. Arthur Cooke, and Mr. Charles Anthony Price, and several other persons were killed, and others wounded. The court-house, school-house, and the fort-house were burned down. The police force is disorganised. The prisoners in the district prison have been liberated.—I have, &c. (Signed) J. O. Mc Kenzie." (Pap. Part 1, p. 18.) The statement of Mr. S. Cooke was to the like effect (p. 19), and stated the numbers of the mob from about 400 to 500, and with cutlasses, spears, and guns.

(*a*) And certainly the first information conveyed to the Governor was well calculated to produce this impression, for he received the following from the principal victim of the massacre, the "Custos" or Lord Lieutenant, who had been, with the other political opponents of Gordon, held up to execration in one of his addresses, and was murdered by the rebels under the personal directions of Gordon's political associate, Bogle, the *active* leader of the outbreak :—" Baron von Ketelholdt to Governor Eyre, Morant Bay, October 10, 1865.—Sir,—I am sorry to say that Mr. G. W. Gordon's inflammatory addresses have borne fruit earlier than I at least anticipated. On my arrival here, a few hours ago, I found the respectable people of the town in a great state of alarm and excitement, in consequence of demonstrations of not only disaffection, but of open violence, by a body of men who came to the Court-house on Saturday armed with bludgeons, and who successfully rescued him [*sic*]. The circumstances that have since happened are detailed in an official despatch to your Excellency's Secretary. The ringleader in this affair is a man of the name of Paul Bogle, who generally acts with Mr. G. W. Gordon. I think it of the highest importance that this outbreak should be stopped in its bud by a sufficient military force being at once detached in aid of the police and volunteers."

(*b*) "On the morning of Wednesday, the 11th instant, at 8 a.m., I received, at Spanish Town, a letter from the Baron von Ketelholdt, Custos of St. Thomas in the East, written the previous evening from Morant Bay, to inform me that serious disturbances were apprehended, and to request that troops might be sent. The circumstances stated in the baron's letter

afterwards to the Secretary of State; and from which it appeared that, on the receipt of the first advices of the first lawless acts of violence towards the police, and the threat of further violence, he treated it merely as a case of ordinary riot, and was content with recourse to military force in aid of the civil power, and troops were at once sent to the disturbed district as speedily as possible, though, unhappily, too late to prevent further and worse outrage.

The impression made upon the mind of the Governor and his council, at the time, by the recital of the horrors of the massacre, which he received from the survivors, would

were to the effect that on Saturday, the 7th October, whilst a black man was being brought up for trial before the Justices, a large number of the peasantry, armed with bludgeons, and preceded by a band of music, came into the town, and, leaving the music at a little distance, surrounded the Court-house, openly expressing their determination to rescue the man about to be tried, if convicted. One of their party having created a considerable disturbance in the Court-house, was ordered into custody, whereupon the mob rushed in, rescued the prisoner, and maltreated the policemen in attendance. No further injury appears to have been done at this time, and the magistrates seem to have thought so little of the occurrence that no steps were taken to communicate with the Executive. On Monday, the 9th October, the Justices issued a warrant for the apprehension of twenty-eight of the principal persons concerned in the disturbance of Saturday, and confided it to six policemen for execution. Upon the arrival of the police at the settlement, where the parties lived—called Stoney Gut, and about three or four miles from Morant Bay—a shell was blown, and the negroes collected in large numbers, armed with guns, cutlasses, pikes, and bayonets. They caught and ill-treated three of the policemen, putting them in handcuffs, and administering to them an oath upon a Bible which they had ready, binding them to desert the whites, and join their (that is, the black) party. Up to this period (Monday night) the Custos had not been in the parish. He arrived on Tuesday, the 10th October, about noon, but did not seem, as I am informed by Mr. Stephen Cooke, clerk of the peace and magistrates, even now to think much of what had taken place; and it was only at the urgent entreaty of Mr. Cooke that he was induced to write the letter to which I have already adverted. Upon receiving this communication at 8 a.m., I immediately sent for the Executive Committee; and, after a hurried consultation with them and with the Attorney-General, an express was sent over to Kingston, requesting the General commanding her Majesty's troops to get ready one hundred men for immediate embarkation."

be depicted by himself in his despatch; and would be important, as giving in his mind (*a*), a fearful colour and character to the rebellion, as likely to be marked, unless summarily crushed, with dreadful and savage ferocity. In substance, it was afterwards but too amply verified (*b*).

Whether such an outrage was an outbreak of rebellion, and likely to spread, would, of course, a good deal depend upon whether, in point of fact, it was repeated or imitated in any other place, by insurgents of the same class and colour; and this was the case in the present instance (*c*),

(*a*) "Whilst proceeding down the harbour, we met H.M.S. Wolverine from the scene of action, bringing up the ladies, gentlemen, and children who had escaped, and some few prisoners who had been captured. The accompanying report was also received from the senior naval officer, conveying an account of the sad scene which had presented itself on the arrival of the Wolverine at 9 a.m. on Thursday morning (October 12th). The shocking tale was still more harrowing, as related by those who had escaped, and some of whom appear to have got away in a most wonderful and almost miraculous manner. No less than sixteen gentlemen were known to have been killed, and eighteen others wounded. The most frightful atrocities were perpetrated. The island curate of Bath, the Rev. V. Herschell, is said to have had his tongue cut out whilst still alive, and an attempt is said to have been made to skin him. Many are said to have had their eyes scooped out; heads were cleft open, and the brains taken out. The baron's fingers were cut off, and carried away as trophies by the murderers. Some bodies were half-burnt, others horribly battered. Indeed the whole outrage could only be paralleled by the atrocities of the Indian mutiny.. The women, as usual on such occasions, were even more brutal and barbarous than the men. The only redeeming trait being that, so far as we could learn, no ladies or children had as yet been injured. I append a narrative by Mr. Stephen Cooke, Clerk of the Peace and Magistrates, one of the survivors, of the circumstances immediately preceding the massacre, and, so far as he knows, of the occurrences of the massacre itself; but it is obvious, from the nature of the case, that it can only be a most imperfect and incomplete account. The true and full story can now never be hoped for. All the principal inhabitants of the district had been killed, and the entire volunteer force (with the exception of a few who escaped), consisting of twenty-two officers and men, nobly died at their posts, gallantly doing their duty.

(*b*) *Vide* the Evidence of Mr. Cooke and others, before the Royal Commission.

(*c*) Thus, on the second day after the outbreak, there was another massacre, by a large party of armed rebels, at an estate called Amity Hall;

for the Governor had reports of similar murders perpetrated or attempted by armed bodies of negroes at other places.

Whether the Governor had ground to believe that the insurrection was likely to spread, would depend on the communications he received as to the disposition and temper of the people, and their language and demeanour, and apparent readiness to join in the rebellion, if it should spread; and the communications received by the Governor were such as were calculated to lead him to that conclusion (*a*).

and the Governor had a statement of Mr. Jackson, Stipendiary Justice, who was left for dead at Mr. Hire's house, when that gentleman was killed:—"After finishing all the magisterial business at Port Antonio on Wednesday last, I started at an early hour on Thursday for Belvedere. On my way through Manchioneal, I was told of the sad events which had occurred at Morant Bay the day before, and was strongly advised by him not to proceed to Belvedere, but to retrace my steps. However, thinking that I had some influence with the people of my late district, by virtue of my position as Stipendiary Justice; and, being imperfectly acquainted with the real state of things, I resolved to proceed. On my way I called at Amity Hall Estate to get some refreshment. Mr. Hire, the attorney of the property, and myself both hoped that the accounts we had heard were exaggerated. As I was leaving Amity Hall, Mr. Chisholm, the overseer of Golden Grove, and Dr. Crowdy, of the same place, came up for refuge, and it was arranged that we should all remain there. About 10 o'clock p.m. (after I had retired to bed), I was aroused by Mr. Hire, and told by him that the rioters were close to the house. I immediately got up, and met them at one of the entrances of the house. I tried to reason with them, but to no purpose; they effected an entrance, and in a few minutes I was prostrate, washed in my blood, and, as I suppose, left for dead. In the morning I found myself on another bed. Soon after Mr. Hire desired to be placed on an easy-chair, with difficulty I raised myself on the bed to see it done; he moaned once, and died. I came down in a man-of-war, and am still in a very weak state; but consider it my duty to report this for his Excellency's information and orders."

(*a*) For instance, the communication from the overseer of Mr. Westmoreland's estate:—"Metcalfe, October 17.—We are quiet here, but it is the general opinion that if a row was begun there would be soon plenty to join, and that some military force should be here to put a stop to anything that may spring up, and every one is very anxious, not knowing what may happen. There has been some threatening language, but it has been what was going on for some time, when the people would not turn out early in

When, therefore, next day (*a*) he received intelligence of the dreadful massacre which had occurred, and found that the blacks had risen in rebellion, and that it was expected that they were preparing to advance in a career of plunder and murder, he at once saw that it was a case with which it was impossible for the small military force then at his command to cope, without declaring martial law; and, accordingly, he at once summoned a Council, with whose concurrence, as they were unanimously of the same opinion,

August; when asked, their answer was, they were waiting for the law from St. Thomas in the East, which, after what has occurred, seems ominous; and trust you will use your influence to get us protected, or we might be sacrificed; the excitement here is intense."

(*a*) "On Thursday, the 12th, about half-past 4 p.m., I received a private letter from a Mr. Davidson, a magistrate of St. David's, which had been sent across the country, stating that it was reported the blacks had risen, and murdered the baron, two sons of the rector of the parish (Mr. Cooke), and several other persons, and stating that it was expected the rebels were coming along the line of the Blue Mountain Valley, to destroy the properties contiguous thereto, and to murder the white and coloured inhabitants. Upon receiving this communication, I wrote a hasty application to the General for 200 more troops, and then at once got upon my horse, and set off for Kingston. Finding that the General had promptly and judiciously anticipated, to a considerable extent, the requisition I had written, it appeared to me that the only additional step to be taken immediately, was to detach a company of white troops from Newcastle, to proceed along the line of the Blue Mountain Valley, and try to intercept the rebels, who were said to be coming up in that direction, whilst a party could be detached from Morant Bay to meet and co-operate with them. This was accordingly done; by midnight the order was sent off to Newcastle, and soon after 3 a.m. the company was under arms, marching to execute the service; a letter having been written by me to General Jackson, an old Indian officer of ability and experience, requesting him to attach himself to the party in his capacity of a Justice of the Peace, and to afford the benefit of his local information and general experience. The Executive Committee met me in consultation at the residence of General O'Connor, and expresses were sent out to collect the Privy Council, which was assembled a little before midnight. The result of the deliberation was, that it was considered expedient at once to declare martial law, and notices were forthwith sent out to the members of Privy Council and members of assembly to meet at 8 a.m. next morning to hold a council of war, this being the legal formality required by the 9 Vict. c. 35, s. 95, 96, 97, 98.

it was resolved to declare martial law; and, accordingly, next day, it was declared under statutable authority (*a*).

The Governor, of course, could only act on the information he, from time to time, received, and the information he received described the insurrection as spreading rapidly. According to the accounts the Governor received (*b*), so rapidly and alarming did the insurrection spread, that an officer and magistrate had to act on martial law, on his own responsibility, in his own district; that is, to direct the military to act as in a state of war or rebellion.

The impression made on the mind of the Governor by the outbreaks of insurrection, and the judgment he formed of it, as to the necessity for martial law, on account of the disparity of military force, would be best shown by the despatches he wrote on receiving intelligence of the outbreak of insurrection. The Governor first demanded military assistance (*c*); and, on the next day, finding this would not

(*a*) *Vide ante*, p. 46, *et vide* p. 125, *in notis*.

(*b*) "Major-General Jackson to Governor Eyre.—Mahogany Vale, Friday, October 13, 1865.—Your Excellency, I humbly tender to your Excellency the cordial thanks of the gentry of Port Royal and St. David's for the prompt despatch of troops. *The insurrection is rapidly increasing*, and I have, with advice of my officers, despatched an express, calling on the officer commanding at Newcastle to send to Mahogany Vale 100 rank and file to join Captain Field. There being no time to refer to your Excellency on such a momentous emergency, I have declared martial law in the mountains of Port Royal, St. David's, and St. Thomas in the East, and hope the same will meet with your Excellency's approval. The rebels are making such rapid strides, I march in the course of an hour to meet them, and your Excellency may depend upon her Majesty's subjects being protected. Whilst I am alive there shall be no repetition of an East Indian mutiny and massacre.—P.S. A serious number of murders of white and coloured population is hourly expected.—F. J." It is to be observed that this so-called martial law only meant the action of the military under, and in aid of, civil authority, a very different thing, though it has often been confounded with martial law. The General in command well knew the difference, and he alludes to this detachment afterwards, in these terms:—"The force under Captain Field, acting under civil guidance of General Jackson. It moved before martial law. I have sent stringent orders to Captain Field, that he may be relieved from supervision of a magistrate."

(*c*) "I regret that information has just been communicated to me, that the insurrection at Morant Bay has assumed a serious form; that the

be sufficient, by reason of the extreme weakness of the military force at disposal, without the power of using the means and rights of war against the rebels generally, held a council, at which, with its unanimous assent, martial law was proclaimed.

On the second day after the outbreak of the rebellion into insurrection, martial law was declared in the disturbed district, by which it was declared that the military forces should have all power of exercising the rights of belligerents against such of the inhabitants as the military might consider opposed to the Government, and to the peaceable and well-disposed subjects (*a*).

On the day after the declaration of martial law the Governor (*b*) wrote, under an evidently deep sense of the

rioters have burnt down the Court-house, released all the prisoners, and murdered several white persons. It is requisite to make preparations to *act promptly*, and I have, therefore, to request, &c., for more troops." (Governor Eyre to General O'Connor, 12th October.) Then, on the same day, "From information I have received, I have reason to apprehend that the insurgents, after devastating Morant Bay, and massacring nearly the whole of the white inhabitants, are intending to march upon the line of the Yullahs, via Sherwood Forest and Richmond. I have to request you will direct fifty men, in light marching order," &c.

(*a*) "Victoria, &c. Whereas we are certified of the committal of grievous trespasses and felonies within the parish of St. Thomas in the East, and have reason for expecting that the same may be extended to the neighbouring parishes of the county of Surrey; we do hereby, by the authority to us committed by the laws of this our island, declare and announce that martial law shall prevail throughout our said county (except the city and parish of Kingston), and that our military forces shall have all power of exercising the rights of belligerents against such of the inhabitants of the said county (except as aforesaid), as our said military forces may consider opposed to our Government, and the well-being of our loving subjects." (Papers, part 1, p. 16.) This, it will be seen, entirely accords with the definition of martial law, according to the best authorities, declaring an absolute military authority, and giving the *military* rights of belligerents, though not, of course, recognizing such rights in the rebels, for rebels can have no such rights; they have begun the state of war treasonably and rebelliously, and must suffer by it, but it confers no rights upon them.

(*b*) "Governor Eyre to the Governor of Barbades.—Morant Bay, October 14, 1865, 4 p.m.—I have the honour to inform you that an insurrectionary outbreak of the most serious and alarming kind has taken place in

imminency of the danger, and the pressure of the emergency, an urgent despatch to the Governor of a neighbouring colony for further military aid, pointing out the military considerations which gave a rebellion a formidable character.

Then, as to the execution of martial law, the supreme direction of the movements and measures to be adopted, and the orders issued immediately upon the proclamation of martial law (*a*), the Governor desired the Commander-

this island. The barbarous massacre of a large number of gentlemen, being ministers of religion, magistrates, proprietors of properties, or persons otherwise interested in or connected with estates in this island, has taken place. A large amount of property has been destroyed; numerous estates in high cultivation have had to be left entirely abandoned; a large portion of the south-eastern, eastern, and north-eastern portion of the colony has been put under martial law; and general apprehension and alarm exist lest the movement extend to the entire island, and the insurrection become a general one. In this emergency, a large portion of the troops stationed in this colony have been rapidly withdrawn from the headquarters, and distributed at various points in the disturbed districts. I have myself been for the last two days personally engaged in directing and superintending, in conjunction with Brigadier-General Nelson, these movements, and I am now on board her Majesty's ship Wolverine, *en route* to Port Antonio, a place on the north side of the island, to establish another military post. The whole of the troops in this colony do not exceed above 1,000 (exclusive of those at Honduras and Bahamas), and I cannot conceal from myself, that such a number is utterly inadequate to suppress the insurrection in the districts where it now exists, and would not supply any troops whatever for the assistance or defence of other portions of the colony, should the outbreak, as is feared may be the case, unhappily extend to them. It may be as well to bring to your Excellency's notice, as an additional reason for this urgency, the immense area of Jamaica, extending about 150 miles in length, and from 50 to 60 in breadth, and the physical features of which are of such a nature as at once to prevent a rapid intercommunication with distant points, and render exceedingly difficult all inland movement of troops, whilst they afford both shelter and supplies of food to the insurgents in fertile fastnesses of the mountains, where a large portion of the peasantry reside. There is no intelligible cause for this sad outbreak, and nothing but the most prompt and vigorous measures will put it down."

(*a*) Having had no man-of-war in port or English steamer, I chartered the Caravelle, one of the French line of packet ships, which fortunately happened to be in port, and was most considerately placed at my service by

in-Chief to send an officer to accompany him to take command of the troops in the field, and a Brigadier-general was accordingly appointed, with whom the Governor personally arranged the general nature of the military operations, for the purpose of suppressing the rebellion, leaving to the General the military *direction*, and he in his turn leaving to the officers in command of detachments particular orders. He and the General co-operated in carrying out any measures they thought proper. But the General exercised his own judgment, and carried out such only as he thought proper.

The supreme military authority in the district under martial law was considered to be in the General in command, subject to the Commander-in-Chief. It is of the nature of martial law to place the district under military authority, and the communications which took place, before and after the proclamation of martial law (*a*), illustrated

Captain Burat. Having completed my arrangements, I returned to Kingston, where I met the council of war, and with their concurrence at once declared the county of Surry, excepting Kingston, to be under martial law, and requested the General to send an officer to accompany me to take command of the troops. He named Colonel Nelson, the Adjutant-general, upon whom I at once conferred the local rank of Brigadier-general in the militia, in order to give him seniority over all other officers of militia or volunteers who might be present."

(*a*) Thus, the day before the proclamation of martial law, the Governor wrote to the Commander-in-Chief for a military force to proceed, under the direction of a magistrate. And the Governor wrote to a Justice of the Peace his instructions, by which the troops were directed to proceed, under him, in his capacity of Justice of the Peace. So, on the same day the Governor wrote to the Commander-in-Chief a requisition for another detachment of troops in another section, so as to hem in the insurgents on this side, and prevent their extending their ravages in the direction of the metropolis, as well as guard the outlying estates in the vicinity of the disturbed district; and he added, "Mr. Fyfe, one of our ablest magistrates, will accompany the detachment." In these instances the requisition proceeded from the Governor, and the troops were to act under magisterial direction. Under martial law the military authorities acted independently. So, in districts *not* under martial law, the troops only moved and acted under the direction of the magistrates. Thus the Brigade-Major reported:—"Falmouth, November 8, 1865. For the information of the Major-General commanding, that, on requisition from the magistrates of

the distinction between the action of the military *in aid* of the civil power, and under its control, and the independent action of the military under martial law.

This distinction was well understood by the General in command (*a*), who, in his despatches after the proclamation of martial law, showed a thorough consciousness that the effect was to give the military independent powers of action, and to invest him with the supreme direction.

In accordance (*b*) with the highest authorities, both mili-

Westmoreland, Lieutenant Brett, with a party, proceeded from Montego Bay." And then Lieutenant Brett reported, to the Brigade-Major, "For the information of the Colonel commanding, that in consequence of a requisition (copy forwarded last night), signed by three magistrates in this neighbourhood, for troops, the force under his command left Montego Bay for this place, where I intend to remain, in order that the magistrates may avail themselves of the presence of the military, to make any arrests they may deem proper." (See Parl. Pap.)

(*a*) Thus, General Nelson, in almost his first letter to the Commander-in-Chief, after martial law was declared, wrote:—"So far as reports have been received, all operations have been satisfactory, except that the force under Captain Field, *acting under civil guidance* of General Jackson, has not reached the point Easington, named by his Excellency the Governor." (*Vide ante* p. 126.) "The detatchment *moved before martial law was proclaimed*; hence Captain Field is in no way responsible. It has deranged my plans, and I have sent stringent orders to Captain Field, and hope he will receive them, and *thus be relieved from supervision* of a magistrate. "The court-martial I named in my letter yesterday as ordered for this day, has sentenced twenty-five to death, and they have been hung." That is, the court was ordered by him, without any reference to the Governor, and so, all through, the acts of the General showed that he considered that he possessed supreme authority in the district, and independent powers of action, precisely as in war, without any necessity for reference to the civil power.

(*b*) The Duke of Wellington said, in the House of Lords, on the 1st April, 1851, in reference to the Ceylon rebellion of 1843, "That martial law was neither more or less, than the will of the General who commands the army, in fact martial law meant no law at all"—and Earl Grey on the same occasion said, "That he was glad to hear what the noble Duke had said with reference to what is the true nature of martial law, for it is exactly in accordance with what I myself wrote to my noble friend (Lord Torrington) at the period of these transactions in Ceylon. I am sure I was not wrong in law, for I had the advice of Lord Cottenham, Lord Campbell, and the Attorney-General (Sir J. Jervis) and explained to my noble friend that what is called proclaiming martial law is no law at all, but merely for the

tary and civil, the General in command assumed and exercised supreme authority as to all military movements and measures, whether in the field or in court-martial, or as to the acts of the Provost Marshal, subject only to the control of the Commander-in-Chief.

This would result necessarily from the declaration of martial law, which, in terms, declared and announced, that martial law should prevail, and that the military forces should have all power of exercising the rights of belligerents against such of the inhabitants of the county as the military forces might consider opposed to the Government, and the well-being of its subjects; so that as to the measures to be taken, and the persons against whom they should be taken, the power rested entirely with the military authorities, although the General acted in concert with the Governor (*a*).

purpose of public safety, in circumstances of great emergency, setting aside all law, and acting under the military power, a proceeding which requires to be followed by an act of indemnity when the disturbances are at an end." [This, however, was an error, *vide ante*, Part I.] And Sir J. W. Hogg said in the House of Commons, on the 29th May, 1851, that a member was inclined to carp at the statement of the Judge Advocate-General (Sir D. Dundas), that martial law was a denial of all law. "But the Judge Advocate was quite correct—it was a denial of all law, and could not be the subject of regulation. The rule was, that when martial law was proclaimed, the commanding officer must use his own discretion." Stephen, in his "Common Laws of England" (vol. ii. p. 561,) says, "Martial law may be defined as the law (whatever it may be) which is imposed by the military power, and has no place in the institutions of this country, unless the Articles of War, established under the Acts just mentioned, be considered as of that character." That is, our ordinary instructions.

(*a*) Despatch of Governor Eyre, 20th Oct., in which he expresses his obligations to the Commander-in-Chief, for the extremely ready and rapid manner in which his applications for troops or arms were met, adding:—"To Brigadier-General Nelson I owe it, that all my wishes, as regarded military arrangements in the disturbed districts, were carried out with the utmost promptitude and efficiency. We never had a difference of opinion, even upon the propriety or policy of a single act or movement, and the public service was consequently conducted, not only satisfactorily, but pleasantly. I regarded it not only desirable, but a positive duty, to be personally present to direct and superintend the military movements in the disturbed districts. From the first moment of the outbreak, up to the date

The measures taken immediately upon the proclamation of martial law were succinctly stated (*a*) by the Governor, in his despatch, a few days afterwards, to the Secretary of State. In that despatch he very clearly stated the principal objects to be attained:—First, to save the lives of the ladies, children, and other isolated and unprotected persons in the districts where the rebellion existed. Secondly, to head the insurrectionary movement, and prevent the further spread of the rebellion in its progress along and around the east end of the island. Thirdly, to punish the rebels and restore peace to the disturbed districts. He added, that, "considering the extreme urgency of the case, and the magnitude of the interests at stake, I considered it my duty to make preparations for proceeding in person to the scene of disturbance, to superintend and direct the operations which might be necessary."

The measures which were taken (*b*), immediately on the declaration of martial law, thus personally directed by the Governor, as stated by him in a despatch he wrote a week afterwards to the Secretary of State, comprised military movements, with a view to rescue the white inhabitants, who had been driven from their homes from fear of slaughter, and also with a view to the attack or apprehension of the rebels, some of whom were speedily captured.

of my return to Kingston this afternoon (20th October), every disposition of the troops, and every movement, has been made by Brigadier Nelson under my own personal instruction and approval. The whole responsibility of what has been done, therefore, rests upon me.

(*a*) Despatch of Governor Eyre, October 20th.

(*b*) "Early on the 14th October, having made arrangements for the remainder of the party at Port Morant to march to Bath, to co-operate with the detachment of thirty-five already there, and under the guidance of several settlers of the district, who had come up with us for the purpose, to collect and bring down the ladies, children, and other refugees to Port Morant, we returned in the gunboat to Morant Bay. The prisoners were landed, and five of them tried by court-martial, four of whom were hung on the stone archway of the burnt Court-house, near to which all the massacres had taken place on the 11th. One prisoner was flogged. The Attorney-General of the colony, in his capacity as a captain in the militia, sat as a member of the court." (Governor Eyre's despatch, 20th October.)

Measures of repression and protection, from the first, went on together; and as all deterrent measures were deemed repressive, and no measures were so deterrent as those of speedy punishment the prisoners first taken were tried at once by court-martial—on which the Attorney-General sat—for complicity in the massacre, which had been committed prior to the declaration of martial law.

It was manifest (*a*) from the nature of these movements as described in the reports and despatches, and which were undertaken, necessarily, under circumstances of great distress, pressure, and emergency, that they were directed as speedily as possible to attack the rebels engaged in actual insurrection. But as the rebels avoided an encounter with the military (*b*), the latter had to go in pursuit,

(*a*) Having made all necessary arrangements, we got under weigh to leave Morant Bay, the gunboat having already been despatched to Port Morant to take in the refugees collected by the troops. Having made this arrangement, we steamed again to Port Morant, and found the gunboat had already taken on board the ladies and children and other refugees (numbering about 100) collected from the Bath, Plantain Garden, and contiguous districts. Many of these unfortunate people had suffered great hardships and run great risks, some having been for days and nights in the canefields or in the woods, without food or clothing, save what they had on, and subject to all risks which exposure at night in a tropical country entails. All had come away without any other possessions than the things they had on. The weather was extremely wet, and the little gunboat, though a refuge from the rebels, could not afford to such a crowd either adequate shelter from the weather, or accommodation of any kind suited to the requirements of delicate women and children. Still the night spent on board the gunboat, and the subsequent voyage to Kingston, must have been one of great trial and suffering to the unfortunate refugees. Eventually they were all landed safely on the afternoon of the 15th. All having been done for the refugees in the gunboat that was practicable, the troops, through whose exertions they were collected and brought in in safety, were re-embarked." (Despatch of Governor Eyre, 20th October, 1865.)

(*b*) "At daylight on the 15th October, the Onyx started for Kingston and the Wolverine for Port Antonio, where we arrived about 11 a.m.; just in time to save this settlement from the rebels, who were burning buildings and destroying property about twelve miles to the eastward, and had already threatened to come in and destroy Port Antonio this very day. A large number of the principal inhabitants had taken refuge on board an American barque, the Reunion.. No time was lost in disembarking the troops, and by noon a strong detachment were on their way under Captain

with the view of following them into their strongholds, and dislodging and dispersing them. And it was obvious from these measures, and the amount of marching they involved, with the consequent fatigue to all who were engaged (especially considering the small number of troops employed), that the impression on the minds of the Governor and all concerned was, that they were dealing with a rebellion, which, if not thus speedily and thoroughly put down, might prove formidable, and if it once rose to a head and became general, would certainly be fatal.

With regard to the disposition and movements of troops (*a*), they were arranged by the Governor in concert with the Commander-in-Chief, and the General appointed to command.

The power and functions of the Governor of a colony, with regard to military arrangements, are very distinctly enunciated in the following instructions to Governors,

Hole, to meet the rebels reported to be at Long Bay (12 or 14 miles to the eastward), and to protect the women and children and other refugees in that district and in that of Manchioneal, to which they were to move in accordance with an arrangement concerted between myself and Brigadier Nelson. Having made all necessary dispositions for the occupation of Port Antonio, the party stationed at Morant Bay was ordered, in co-operation with the party expected from Newcastle up the line of the Blue Mountain Valley, at once to march by night upon the stronghold of the rebels at Stoney Gut, about four miles inland from Morant Bay, so as to arrive about daybreak, and, if possible, destroy the stronghold and capture or cut off the rebels. I personally inspected the Maroons, a fine body of about 150 men, who, in the most loyal spirit, had come down on the day preceding our arrival, ill-armed as they were, determined to protect Port Antonio. They were unbounded in their devotion and loyalty, and were beyond measure delighted to see again their former captain, the Hon. A. G. Fyfe, whom I had brought with me in the Wolverine, and under whose orders they at once placed themselves. A party of Maroons had already been of great service in protecting Bath, and the fact of this singular and isolated people proving faithful is one of incalculable value to the Government in the emergency which exists." (Despatch of Governor Eyre, 20th October, 1865.)

(*a*) In his despatch, October 20th and 24th, he stated :—"That from the time of my arrival in Kingston on the evening of the 12th October, to direct in person the movements of troops and other arrangements which I considered necessary for the safety of the colony, until the 20th October,

namely (*a*) : "It is his duty (the Governor's), except in the case of invasion, or assault by a foreign enemy, to issue to the officer in command of her Majesty's forces within the colony, orders for the march and distribution of troops, for the formation and march of detachments and escorts, and generally for such military service as the safety and welfare of the colony may appear to him to require, but that all the military details regarding such distribution and the manner in which the detachments shall be formed and composed rest with the military officer, who is responsible that they are conformable in every respect to the instructions issued to him by the Governor."

The Governor considered that it was his duty, generally, as Governor, to issue orders for the "march and distribution of the troops, for the formation and march of detachments, and generally for such military service as the safety and welfare of the colony appeared to require. The military details, however, regarding such distribution, and the manner in which the detachments were to be formed and composed, and the direction of their movements and measures in the declared district, were deemed to rest with the General in command, and were all carried out by him, although in concert with the Governor.

The general suggestions made by the Governor for the direction of the military movements, and measures to be taken, plainly pointed out that the great object was to cut off or capture the rebels, that is, all those who either were

when I left Morant Bay, satisfied that the rebellion was got under, there was not a single movement made by Brigadier-general Nelson that was not undertaken at my own special request and direction, not indeed in writing, because my intercourse with Brigadier-general Nelson was of so friendly a kind that the arrangements were decided upon in confidential discussion, and without our ever having any disagreement or difference of opinion. Upon the eve of going I left a minute stating the arrangements I wished to be continued, but which were in fact, with little exception, arrangements that had been previously agreed upon and determined."

(*a*) See despatch of Earl de Grey, Secretary of State for War, to Mr. Cardwell, Secretary of State for the Colonies.—Parl. Pap.

or had been in arms; all those who had taken an active part in the rebellion (*a*).

During the whole period of martial law, the Governor acted in the most entire harmony with the Commander-in-Chief, and the General in command of the forces, in arranging with them the necessary military movements; every disposition and movement of the troops being made with his approval, so that he avowed his entire responsibility for what had been done, while giving a general approval to it all.

According to the military usage in such cases, Provosts Marshal were put in authority at the two chief military stations of the district (*b*); one being the head-quarters of the Commander-in-Chief, and the other of the General in command; and they, subject to the control and direction of the military commanders, took charge of prisoners, and issued such regulations of discipline as are usualy enforced in such cases.

(*a*) Mem. for the General, after directing military stations:—"That they should be sent into the centre of the line between Morant Bay and Port Antonio, to be divided into two divisions, one to act in the direction of Morant Bay, or towards Blue Mountain Valley, the other towards Bath, Plantain Garden River, and Manchioneal districts, each scouring the hills and the outskirts of the cultivated lands, *to drive in, cut off, or capture the rebels*, if any have retired from the lowlands or lands contiguous. If the Maroons thus act in co-operation with the military parties, I think the country will be completely scoured, and *those in arms against the Queen be either cut off or captured*—a step which is essential, prior to the declaration of an amnesty."

(*b*) At Morant Bay and at Kingston, the former, Ramsay, was under General Nelson, the General in command, and the other, Major Prendeville, was under the Commander-in-Chief, General O'Connor. The military commander, from time to time, issued orders to the Provost Marshal, and gave their directions as to disposal of prisoners, &c. As, for instance, the following was issued by one of them, the former:—"Morant Bay, Sunday, 12 o'clock, Provost Marshal's office, Oct. 18th, 1865. Provost Orders. 1. Police and all well-disposed inhabitants will have passes numbered. 2. All inhabitants to be in their houses at 5 p.m., and not to move out until 5 a.m., unless the military authorities order the evacuation or otherwise. 3. Persons without passes will be dealt with summarily. 4. All persons who are aware of any rebel or accomplice, will give information, to G. W. Ramsay, Provost Marshal." This notice was stuck up at the police station, and no doubt was strictly enforced.

The course (*a*) which by military usage is to be taken with prisoners under martial-law, may be gathered from the orders issued by the Commander-in Chief to one of the Provosts Marshal—at the station more immediately under his personal command and control.

The general orders issued, either by the Governor (*b*) or

(*a*) Major Prendeville, who was appointed Provost Marshal at Up-Park Camp, Kingston, at the express desire of the Major General Commanding, received from him special powers, to inflict summary punishment on those deserving of it, and to release those he thought innocent. "Jamaica Command. Head-Quarters, Kingston, 27th October, 1865. Sir,—I am directed by the Major General commanding, to transmit to you an extract from a letter addressed by his Excellency the Governor to the Major General. In furtherance of the opinion expressed by his Excellency, and in consequence of the large number of prisoners now at Up-Park Camp, I am to direct you to take pressing steps to dispose of these cases, either by courts-martial, or, where the charge is not of a serious nature, by the infliction of such amount of corporal punishment as you may deem the offence merits. Where evidence is wanting in support of a minor charge, release the prisoner with a caution.—I have the honour to be, Sir, your obedient servant, (Signed) John Elkington, Lieut.-Colonel, D. A. General." And again, Major Prendeville Provost-Marshal, Up-Park Camp. [Extract.] "I am of opinion that all prisoners should, as rapidly as possible be tried, and those who are deserving of death or flogging be released; it is not desirable, with our over crowded jails, to sentence persons to imprisonment, nor would I advise that flogging should be resorted to more than can be helped." [True Extract.] (Signed) John Elkington, Lieut.-Colonel, D. A. General. October 27, 1865.

(*b*) Thus, at Kingston, the Provost-martial received, from the Commander-in-Chief, special powers to deal with prisoners in this way. The letter, conferring upon him these powers, contained the following extract from a despatch written by the Governor:—"I am of opinion that all prisoners should, as rapidly as possible, be tried; and those who are not deserving of death, or flogging, be released; it is not desirable, with our overcrowded gaols, to sentence persons to imprisonment, nor would I advise that flogging should be resorted to more than can be helped." The Commander-in-Chief also wrote to one of the officers in command of detachments:—"I have instructed you to send out parties and capture any rebels they may discover; and I am much pleased by your adopting a more decided course with regard to captured rebels. The number you have sent into camp on charges, or suspicion, caused some embarrassment. One of two courses seems to me, under martial law, to be the rule for you to adopt. If, on careful investigation, the captured prisoners are innocent—always giving them the benefit of the doubt—then release them; but, if guilty, or taken red-handed, then summary justice and execution." He explained

the General Commanding-in-Chief, were, that rebels should be captured, and that (according to the Queen's Regulations) all prisoners taken should be dealt with as speedily as possible by summary enquiry, and that those taken under such circumstances as to leave no doubt of their actual participation in the rebellion, should be executed; minor punishment being inflicted on those who were merely convicted of plunder (*a*).

The Commander-in-Chief (*b*), having chosen a superior officer to command as Brigadier in the field, gave him general, but no special instructions; but, considering him as well informed as himself as to the state of affairs, left him, and the officers under him, to carry on the military operations according to his own judgment, giving them no particular directions as to the mode of carrying out martial law, beyond general directions to capture rebels, and dispose of them summarily, according to their deserts.

The general principle (*c*) was laid down by the Commander-in-Chief, that rebels were to be captured; that if they were guilty, and taken red-handed, *i.e.*, under circumstances which made their guilt clear, they were to suffer

that what was meant by this reference to a "more decided course," was that the officer should dispose of prisoners in the field according to his own discretion.

(*a*) This, of itself, showed that those only were to be executed who were convicted of active complicity in the rebellion.

(*b*) He gave to the Brigadier a memorandum:—"The Major-General can give you no instructions, and leaves all to your judgment. But he would like you to be careful about burning villages, and not to do so unless it is clear the inhabitants have joined the insurgents. He gave no instructions to any officer in the field, except one (Colonel Hobbs), which ran thus:—"October 20, I was entrusted by Lieutenant-Colonel Elkington, acting Adjutant-General, to order you to make Moncklands, your head-quarters for some time, sending out parties to scour the adjacent country, and capture any rebels they may discover. The Commander-in-Chief gave no more particular instruction to the officers as to the execution of martial law. He said that at the time Brigadier Nelson proceeded to Morant Bay, he was as well acquainted with the exigencies of the case as witness was, and afterwards he knew still better than witness did, what was necessary.

(*c*) *Vide* Evidence of Major-General O'Connor.—(Rep. of Royal Comm.)

summary justice; but if this guilt was doubtful, they were to be released; and this was interpreted by the General in active command, to mean that all ringleaders, or those who were found in arms, were to be summarily dealt with (*a*), whether or not found actually engaged in conflict or attack, —as being in arms, not on the side of the Crown, was a clear act of rebellion.

It might be collected, from the tenor of the orders, and despatches, that the general view of the military commanders (*b*) was, that they were to deem themselves in the

(*a*) *Vide* Colonel Nelson's order, October 20, to Lieutenant Adcock:— "All ringleaders to be secured; men *found in arms* to be summarily dealt with; minor punishments to be inflicted on the spot." So in his despatch from the Brigadier-General, 17th October:—"Captain Hole's proceedings were temperate, decided, and judicious; all rebels captured, having been tried, he had instantly executed." The context and the other despatches showed that by this was meant actual rebels, convicted of *active* participation in the rebellion; taken red-handed, as the Commander-in-Chief expressed it.

(*b*) The Commander-in-Chief, in his orders, implied this; so the General in active command, who indeed avowed in his evidence that he relied on it; "that he deemed the whole population to be rebels, until they proved the contrary; and that he was in an enemy's country, or otherwise, martial law (he presumed), would not have been proclaimed." (*Vide* his Evidence before the Royal Commission). It is difficult to divine what other view could possibly be taken, that on what has been shown to be the true theory of martial law, viz., a state of war. In such a state of civil war, or rebellion, there can be no neutrality, and so the mere standing aloof was unlawful, and was *primâ facie* proof of complicity in the rebellion. That being so, it was deemed that it was for those who, while thus acting unlawfully, in violation of their allegiance, were seized, on suspicion, by the forces of the Crown; it was for them to show that they had *not* been engaged in the rebellion; and hence, the officers always asked for such proof as might, in most cases, readily be furnished, if, indeed, the men had been honestly occupied. To have gone on the opposite principle, of arresting, or convicting no one against whom specific charges could not be made out upon evidence obtained beforehand, would not have met the mischief, to meet which martial law is proclaimed, as it is often impossible to obtain such evidence in a state of rebellion, in which nearly the whole of the population are implicated. When, in addition to the *primâ facie* evidence, there were other circumstances, as, the being found together in bodies, especially if with arms; the possession of plunder, especially if belonging to those murdered; of course, there would be evidence of an *active* participation in the rebellion, which would warrant, as the General deemed, punishment under martial law.

proclaimed district, as in an enemy's country, in which the whole population (not actively engaged on the side of the Crown) were to be deemed *primâ facie* rebels, and liable to be attacked as such; and that the *onus* then rested upon them of proving their innocence of any complicity in the rebellion; though it was not to be necessarily assumed that they were guilty of any active part in it, still less, of course, without some additional circumstance, that they were guilty of any of the acts of murderous and felonious outrage by which it had been accompanied.

The proclamation of martial law itself (*a*) authorised the military to treat, as belligerents, all those whom they should consider opposed to the Crown, or its loyal subjects. And *primâ facie*, they considered that those who were not *with* them were *against* them (*b*). The circumstances of the capture, however, would always, more or less, either aid or rebut this presumption, and show whether the prisoners were to be regarded as rebels; especially the circumstances of their being found in arms, or assembled in bodies; for bodies of men assembled in time of rebellion, who may easily, at a distance, be supposed to be armed, are naturally suggestive of hostility.

In short, the whole tenor and character of the military measures adopted, showed that the military Commanders dealt with the people in the rebellious districts *as a body* (*c*),

(*a*) *Vide ante* p. 127).

(*b*) The result proved that the people perfectly well knew it was their duty to be on the side of the authorities; for although—notwithstanding the horrible character of the massacre, and murders, which accompanied the outbreak of the insurrection, there were no signs of horror and sympathy on their part—yet, when the military had quite gained the ascendancy, they began to come in and offer themselves as special constables, and these rebels in disguise, there was reason to believe, committed some of the atrocities which were afterwards charged upon the troops.

(*c*) This is the real distinction between the state of *war*, which is established under martial law, and the system which prevails at common law in ordinary times. The common law deals with individuals; because it is presumed that there are ample time and means for distinguishing their grades of guilt, and for requiring strictness of particular proof. But in war this is impossible; and men are necessarily dealt with a good deal in the

and *in the mass;* as having a general and pervading character of rebellion—raising a presumption against them of complicity in the rebellion, which required to be rebutted to establish their entire innocence, though, on the other hand, it required to be supported by some further circumstances to raise a presumption of *active* participation in the rebellion; and some further circumstances to raise a presumption of guilt of acts of felony or murder.

Taking the general tenor of the orders to the officers, their reports to their superiors, and the tacit or expressed approval of the measures therein stated to have been adopted, it may have been collected that, in the view of the Governor and the General in command, martial law required the pursuit and capture of rebels—that all men found within the proclaimed district, not on the side of the Crown, were liable to be arrested, and, if found in possession of plunder, to be summarily punished; that all who were found in arms, or were taken under such circumstances as to show an active share in the rebellion, were *liable* to be executed; and that those against whom, in addition, there was a probable presumption that they had committed, or aided and abetted in acts of murder, before or after martial law, or

mass, and on general presumptions. And let it be borne in mind, that rebels and traitors, though enemies, are not regular enemies, entitled to the *benefit* of the regular laws of war, beyond the natural dictates of humanity. They are in a state of treason and rebellion against their sovereign. All who are not active on the side of the Crown are, strictly, liable to be regarded as in a state of rebellion, unless they can show that they are not so; and are, therefore, liable to be captured. Nevertheless, it will be found that distinctions were drawn, on the whole, as carefully as possible, by the military commanders, between the different grades of guilt and degrees of proof. Mere passive complicity in the rebellion was never, by military orders, punished capitally; nor even the mere possession of plunder, unless there were circumstances to connect it with the actual perpetration of acts of outrage, such as murder, or attempted murder. The possession of articles belonging to those recently murdered was certainly deemed, on principles of presumptive proof, recognised at common law, sufficient to justify instant execution, in the absence of any explanation.

threats of murder under martial law, were *to be* executed (*a*).

At first it was supposed that only men found with arms *in their hands* were to be considered as in arms, but this was deemed, practically, to be too strict an interpretation of the phrase "found in arms" (*b*); and certainly was not adhered to.

The General in command of the force in the field (*c*) had, on the declaration of martial law, directed officers to proceed with detachments of troops in different directions, where it was supposed the rebels were, or might be, in force, with a view to surprise and attack them; and they, from time to time, reported to him, and he reported to the Commander-in-chief, the nature of the military movements and measures taken.

The General in actual command (*d*) issued orders of a

(*a*) *Vide* the orders of the Governor and the Commander-in-chief, *ante*, p. 135; and of the General in command, *vide ante*, p. 136: and the despatches of the Commander-in-chief to Col. Hobbs; and of the General in command to Capt. Hole and Lieut. Adcock, &c., *vide post*.

(*b*) It would exclude cases of men who had just *left* their arms, intending to resume them.

(*c*) See the despatches of the Governor to Gen. Nelson :—"On the 14th of October, I heard that Stoney Gut was the stronghold of the rebels; and, not having the slightest doubt that this was the truth, and that they were there in force, issued orders accordingly." "Port Antonio, Oct. 15, 1865.—The senior officer in command of the troops at Morant Bay will proceed with detachments to Stoney Gut and James Town (distant about four miles from Morant Bay). The object is, if possible, to surprise the rebels, who are supposed to make these places their strongholds. Great discretion is necessary in making the move, and a trustworthy guide is indispensable; the party should move so as to arrive at Stoney Gut at daybreak. Every precaution to be observed in making an attack, and a reconnaissance should be made previous to such. The officer commanding the troops at Morant Bay will communicate as constantly as possible with this station, reporting all occurrences." So on the 20th October, he issued the following order to another officer in command of another detachment;—"Morant Bay, Oct. 20, 1865. G. O. Field Force.—Capt. Hole, commanding troops, Manchioneal, will detach a party, under command of an officer, &c., to move on the direct road between Manchioneal and Bath, &c."

(*d*) Gen. Nelson's evidence and despatches:—"On arrival at Port Antonio,

general nature to the officers in command of detachments, directing their movements, but necessarily leaving the more particular measures they might adopt a good deal to their own judgment.

Then the officer in command of the force gave them more particular orders, which were to be collected for the most part from their reports of what they had actually done, or directed to be done, the effect being that they did their best to attack and capture those whom they supposed to be rebels, either in the field, or in their "camps," or places of concealment, in the woods, or in the "bush" (*a*).

they refused to go without Col. Fyfe's orders, saying he was their old Captain Fyfe, who had been their leader in 1832. I waited till Col. Fyfe landed, and then issued an order describing the arrangements, and thus concluding—'The above to be considered as the basis of operations of the Maroon force, but Col. Fyfe is *authorised to follow his own judgment, according to occurring circumstances, reporting as frequently as possible all movements.*' By doing this, and by giving conjoint orders to other detachments, I prevented the rebels from getting to Kingston." So in a despatch to the officer in command of another detachment:—"You will act entirely on your own judgment, and such information as may be gathered, making excursions in any direction supposed to be advantageous." So in another despatch:—"I had to leave much to the discretion of Captain Hole, on whose judgment and decision I have much confidence." (Gen. Nelson to Gen. O'Connor.)

(*a*) Thus, for instance, Col. Fyfe, the commander of the irregular force of the Maroons, stated, in his despatch of the 22nd October, that he had been in quest of a supposed "camp" of the rebels. So in another despatch of the 29th October, to the Governor, he described how he had been carrying out his general directions:—"I have been scouring the whole of this valley, from the backwoods of Wheelerfield, up beyond Whitehall. A great deal of plunder discovered; everything quiet; the people subdued, and surrendering to me fast for some days. I give these papers of protection by twenties and thirties, pending your Excellency's pleasure, and provided they have not been concerned in cases of murder, and have no plunder in their possession; these papers are also given to those who bring in the stolen articles, for otherwise fear would prevent their delivering them up." So in another despatch:—"I sent out a party of Maroons in advance to scour the woods in this vicinity. They met with no one, but a small party is again to start a little after midnight to search a cave where one of the prisoners states one of the ringleaders is concealed. As there are several prisoners here who are said to be deeply impeached, I have, at the request of Captain

The nature of the measures sanctioned by military authority would be gathered, in the absence of express or explicit orders, from the express or tacit approbation, by the military commander, of measures actually taken. Thus, on the day after the declaration of martial law (*a*), the first official despatch from the disturbed district was sent to the Commander-in-Chief, by the General commanding in the field, stating that large bodies of rebels had been attacked in the very act of felonious outrage, and that others, taken not in the act, had been at once summarily tried, and sentenced to death by drumhead court-

Field, of the 6th Royals, directed a court-martial to be held at daylight to-morrow." (Reports of Colonel Fyfe, Parl. Pap.)

(*a*) It is important to bear in mind the information conveyed to the Commander-in-Chief and the Governor:—"Major-General O'Connor, C.B., commanding the forces of this island, feels much satisfaction in publishing the following extracts of a despatch from Brigadier-General Nelson, A.D.C., commanding the troops in the disturbed district:—'Morant Bay, October 14, 1865. It would appear Captain Luke had received information that the rebels were in force at Port Morant, and thus determined to advance upon them. He did not meet with opposition; but the gunboat, on arrival, found a large body (about 800), chiefly women, and in the act of demolishing the house of Mr. Duffus. They fired three shells from the 32-pounder, and dispersed the mob. Captain Luke had issued orders for his Bath party to rejoin him at an early hour this morning. His Excellency the Governor during the night obtained information that some of the chief rioters, who had pillaged houses, &c., were living close by, and at his suggestion I, at 2 a.m., sent out a party, and succeeded in apprehending three men. At 6 a.m. I ordered a drumhead court-martial to be assembled for trial of one of those taken up. The court sentenced him to be hung on a tree, where the inhabitants would see his corpse. Intelligence was received by his Excellency the Governor, rendering it necessary to throw troops in Port Antonio. I therefore proceed there with forces stated The trial of prisoners is now going on in the intended new church here, and the result, I apprehend, will be against the rebels, strong evidence just forthcoming. I have now detailed, so far as concluded, the different arrangements made, and can only hope my measures may meet with your approbation.'" This despatch, it will be observed, was published by the Commander-in-Chief with satisfaction and with approbation; and it is to be presumed the measures here described were duly taken under martial law, in accordance with military usage.

martial, which despatch was at once published, with approval, by the General commanding in chief.

The first important report (*a*), received from the officer in command of one of the detachments, described the rebellion as much more serious and organized than had been expected, and stated the signs and symptoms of a state of rebellion which were observed. It also disclosed that negroes were attacked, if either discovered together in

(*a*) "Colonel Hobbs to Major-General O'Connor.—Moncklands, St. Thomas in the East, Jamaica, October 15, 1865, 6 p.m.—Sir,—I have the honour and the pleasure to report, for the information of your Excellency, that I marched to-day from Amtrolly St. David into the very heart and stronghold of the rebel country. We started at an early hour, having received most correct information of the locality of the insurgents. There can be no doubt, from what I have witnessed this day, that the rebellion is much more serious, and more regularly organized than we had at all expected; not only have the entire of the disaffected villages been vacated, but all over the country there are several mounds erected, and flags of various colours (preconcerted signals) are flying from all commanding positions; and it is my duty further to inform your Excellency, that the class of people who are employed in this rebellion are not the poor, but a class of small landholders who are, in every sense of the word, freeholders. Finding this to be the case, and with the concurrence of three magistrates of experience, I set fire to the entire of the vacated houses. Two pistols were found, some impromptu drums, and numerous indications of meetings and assemblies in their chapels (native Baptists) and villages. The amount of horses, pigs, poultry, and comfortable clothing left behind by the people, as also the amount of coffee, and provisions of all kinds, indicate the utmost amount of comfort on the part of the people composing the rebellion, who, unfortunately (aided by the natural advantages of the country, and numerous well-mounted scouts), gave notice of our presence, and fled. We, however, secured six prisoners, whom I would have shot, but from the fact of their being unarmed. I now regret I did not do so, as they are no doubt rebels. We have, however, killed between fifteen and twenty of them at extraordinarily long distances, having discovered since several groups of them on the hill sides, and in trees." The tenor of this, and other despatches, showed that the officers considered that persons of the same class and colour as the insurgents in the disturbed district, and standing aloof from the Queen's troops and authorities, were *primâ facie* rebels, but not to be attacked or executed on the spot, unless found in arms or assembled in bodies, apparently in arms, as they might, at a distance, be supposed to be. And this view is to be collected from the orders of the Generals in command.

bodies, or in arms, and that they were captured whenever they were found, and did not give an account of themselves. In this despatch was disclosed, for the first time, the difficulty of dealing with prisoners not taken actually in arms, though under such circumstances as to lead to the belief that they had been in arms, or engaged in actual insurrection.

Perhaps the most important point as to the measures taken under martial law, was as to the mode of dealing with, and disposing of, prisoners, especially when not taken actually in arms, or engaged in actual outrage, nor "red-handed," as the military phrase is. For, notwithstanding the absence of all these circumstances, there might be evidence that they had been engaged in actual insurrection. And this was considered a class of cases to be dealt with by court-martial.

So soon as, by prompt and energetic measures (*a*), it was

(*a*) "It was now clear that, by the rapidity of our movements, we had got ahead of the rebellion, which, breaking out at Morant Bay, had proceeded rapidly along the south-east, east, and north corner of the island. By occupying Port Antonio in time, we not only saved that district from destruction, but we met, and stopped the further progress of the rebellion twelve miles east of it. We had, indeed, accomplished some most important results in a singularly brief space of time. A military post was established at Morant Bay, and another at Port Antonio, whilst the centre of a line connecting the two was occupied by the friendly Maroons. The greater portion of the rebels were, therefore, hemmed in within the country east of this line. The spread of the rebellion westward was stopped, and if no independent outbreak occurs in any other part of the island, we shall have the disturbed districts under control, and can at leisure deal with and punish the insurgents. At the same time, all the helpless and unprotected ladies, children, and other refugees, have been got in and saved. All our most important work being thus done, and the troops comfortably established in their barracks, we had for the first time a night of quiet and rest, on the night of Sunday, the 15th October." So, in his address to the Legislature on the 8th November, a week before the cessation of martial law:—"Within three days from the time of the news of the rebellion reaching Kingston, the rebellion was checked, and hemmed in; within four days it was crushed, and arrangements made for measures in the district to capture and punish the great leaders, who have met their just doom. To this prompt and decisive action I firmly believe we owe it,

manifest (as was stated in the same despatch) that in three days from the declaration of martial law the military power had got ahead of the rebellion, and its further progress was stopped in one direction—so that, if no new outbreak occurred in any other parts of the island, the disturbed district would be under control—the Governor directed his attention to the trial of prisoners taken.

It was necessary, and was plainly implied in these general orders, that not only should rebels be attacked, or executed if taken in the act (*a*), but that where taken "red-handed," in military phraseology (*b*), that is, under circumstances raising a strong presumption or probability of their having taken part in the rebellion, or the outrages by which it was accompanied; or where, upon summary enquiry, their guilt should be clear, summary justice should be done.

Accordingly (*c*), the superior officers in command of detachments, were not only authorized, but directed to hold such summary enquiries, by what are called drum-head

under God's providence, that we are about to assemble here this day. One moment's hesitation, one single reverse, might have lit the torch which would have glared in rebellion from one end of the island to the other, and who can say how many of us would have lived to see it extinguished?" This passage was strongly relied upon, as showing that there was no necessity for continuing martial law or measures of severity. But it was lost sight of, that this was written rather of the cessation of actual insurrection, and that such cessation was only caused by terror of martial law, and terror kept up by these measures. And in that very despatch he stated, in the strongest terms, that he believed the island was still in great danger. Next day, on the 16th, the Governor mentioned that courts-martial were held, and twenty-seven persons, found guilty, were hung.

(*a*) This might be done at common law (*vide ante* p. 29); and therefore, something more must be meant by martial law.

(*b*) In old legal phraseology, in "the *mainour*;" that is, not in the act, but under circumstances raising such a strong presumption of guilt that, by the ancient law, the person so taken might be summarily executed, without trial (*Ashford* v. *Thornton*, 1 B. & Ald.). This, of course, has long been obsolete in our law; but the doctrine of presumptive proof is still retained in our criminal law (*vide The King* v. *Burdett*, 4 B. & Ald. 122).

(*c*). *Vide ante*, p. 83.

courts-martial (*a*), such as are usual in an army in the field or in time of mutiny, for the trial of prisoners, and in capital cases the proceedings were, from time to time, sent to the General in command for approval. Indeed, if possible, it appears to have been deemed proper, that the charge should first be submitted to him before the court-martial.

On the third day after the declaration of martial law (*b*), the General in command of the forces on service sent a

(*a*) See the despatches of the officers in command of detachments, Col. Hobbs and Capt. Hall especially. See the despatch of Lieut. Adcock, who, being a subaltern, did not deem himself at liberty to carry out a capital sentence, without reference to the General in command; and it appears from the despatches and orders of the General, that, as a rule, when there was no pressing emergency, it was proper to submit to him capital cases, before holding the court-martial, and certainly before execution of the sentence. In ordinary military law, there is a distinction between regimental and general courts-martial, and only the latter have power to pass capital sentences, but these rules do not apply to drum-head courts-martial in time of mutiny, rebellion, or war (*vide* Simmons on Court-Martial). And though the lawyers, in *Wall* v. *Macnamara*, said that drum-head courts-martial had no power of life and death, the military witnesses did not say so, and it is notoriously otherwise.

(*b*) "Gen. Nelson to Gen. O'Connor, Oct. 14.—I ordered a drum-head court-martial to be held for the trial of one of those taken up, and the court sentenced him to death. I at once caused him to be hung on a tree. The trial of prisoners is now going on, and the result I apprehend will be against the prisoners, strong evidence being forthcoming." "Oct. 16. The court-martial I named in my letter yesterday, has sentenced twenty-five to death, and they have been hung. Some confessed as having participated in the murder of Mr. Hire, on the 13th. The Attorney-General, Mr. Heslop, has been a member of the Court, holding a commission as captain of militia; thus the Court has received the benefit of his legal acumen, a point of considerable import when the proceedings hereafter may become the subject of discussion." This passed through the hands of the Commander-in-Chief, who, of course, would be supposed to know military usage, and it did not occur to him, any more than to the Attorney-General, that the courts-martial, under martial law, had no jurisdiction over acts of rebellion, prior to the declaration of martial law, that is, the *very rebellion* against which it was declared. It only declared a state of war or rebellion existing, and the crimes in question were committed during *that state of rebellion*. They had begun the war, and the acts were part of that war, and liable to the penalties of war.

despatch to the Commander-in-Chief, and through him to the Governor, disclosing that courts-martial had been held for the trial of prisoners, and that a number had been convicted and executed for active participation in the rebellion, and the acts of murder by which it had been commenced prior to the declaration of martial law. And this course had the assent of the Commander-in-Chief and the Governor-General.

In most of the cases (a), in which capital punishment was inflicted, it was for complicity in the original massacre, or the acts of murder, or attempted murder, which ensued, just before the declaration of martial law. And if these had not been so dealt with, those who had committed the worst atrocities in the original outbreak, which called forth martial law, would have escaped, although they included the ringleaders; and though these atrocities were perpetrated prior to the declaration of martial law, and thus were, in fact, the very acts of war against the Crown, and its loyal subjects, which called for it. And the terror in-

(a) The peculiar features of the Jamaica case was, that the worst atrocities were perpetrated on the first and second days of the rebellion, in acts of murder and massacre against the whites. That such atrocities were not repeated, was only because the whites, driven from their homes by the terror thus inspired, found refuge in flight or concealment. But if they were to return to their homes, it would only be through the terror being removed through a counter terror, inspired by prompt and terrible punishment inflicted upon the perpetrators of these massacres and murders, which were all committed previous to the declaration of martial law. If this had not been done, martial law would have been useless, and obviously unequal, for it would have been unequal, indeed, to hang plunderers and allow murderers to pass by; and to leave them to the dilatory and doubtful chances of common law, would have been to wait until the danger was over. Thus it was that those who were convicted of taking part in the massacre, were summarily tried and executed. Col. Fyfe shot, without trial, a man whom he found wearing the ring of one of the victims. And the ringleaders, Bogle, M'Laren, &c., were summarily tried; and it being shewn that they were present, aiding and abetting at the massacre, they were convicted and executed. So in several cases men, who had entered the houses of white men in search of the owners, and as their threats showed, for the purpose of killing them if they had found them, were summarily tried, and convicted, and executed with the sanction of the General.

spired by these summary trials and executions, were made the means of deterring others from similar atrocities, which would otherwise have been perpetrated on others.

Very soon after the military operations commenced, the officer in command of a principal detachment informed the Commander-in-Chief (*a*), that he was necessarily embarrassed by the large number of prisoners, whom he hesitated to execute, and of course could not retain, and the substance of the directions he received was that he should execute all whose complicity in the rebellion was clear; inflict minor punishments for mere acts of plunder, and release the rest, and the General in actual command approved (*b*) of a similar proceeding.

When prisoners began to accumulate inconveniently, the General commanding-in-chief sent to the Colonel in command of the garrison a despatch to the effect that he was to deal with prisoners in a more summary manner, and not to forward more prisoners to head-quarters; explaining that he was not to deal with them in all cases capitally, but that, on account of the necessity of the case, he should deal with them summarily on the spot; and the General (*c*) in the

(*a*) Col. Hobbs' despatch, 16th Oct., said :—"Numbers of rebels have come in, having thrown away their arms, and seeking protection. These men I cannot possibly undertake to guard. They are embarrassing the troops, and I believe they are all worthy of death, but I shrink from the responsibility of executing them, without first hearing your (General O'Connor's) wishes respecting them." In answer to that he received from the Commander-in-Chief directions in substance, not to keep prisoners, but to make the best enquiry he could, and to execute those whose guilt he found to be clear, inflicting reasonable punishments for offences, and releasing the rest.

(*b*) On the 17th Oct., the Brigadier sent to the Commander-in-Chief a despatch, stating that one of the officers in command of one of the detachments (Capt. Hole), had taken a course, temperate, decided, and judicious. All rebels captured, having been tried, he had instantly executed (of course meaning, if convicted). In several houses he found plunder secreted, and razed them to the ground, and intimated that where he discovered spoil, he should adopt a similar course. As to this, however, *vide post.*

(*c*) Thus Colonel Hobbs having stated that many prisoners were taken, received a despatch from the Deputy Adjutant-General:—"The Major-

field gave similar orders, in accordance, as he deemed it, with the spirit of the Queen's Regulations (*a*).

Two days afterwards (*b*), the same officer in command of the detachments sent a despatch to the Brigadier-General, which appears to be approved, announcing the capture of several ringleaders, who had been engaged in actual outrage and acts of rebellion, and the trial and execution of some of the prisoners; and also stating that a great number of prisoners remained on his hands, and that the number was

General hopes you will deal in a more summary manner, and on no account forward any more prisoners to this place," &c. It was at this time, and was owing to these reports, that the Commander-in-Chief wrote to the Colonel:—"I instructed you to send out parties to capture any rebels you might discover. I am much pleased by your adopting a more decided course with regard to captured rebels. One of two courses seems to me, under martial law, to be the rule for you to adopt. If, on careful investigation, the captured persons are innocent, always give them the benefit of the doubt, and then release them; but if guilty, or taken red-handed, then summary justice," &c.

(*a*) General Nelson explained, in his evidence, that by the Queen's Regulations no prisoners are to be kept more than forty-eight hours in custody, without their cases being disposed of; and although these Regulations do not necessarily bind in war, yet this does all the more apply in time of war, on account of the obvious necessity of the case, from the difficulty of dealing with prisoners.

(*b*) Extracts from a despatch from Captain Hole to Brigadier-General Nelson:—"Manchioneal, Oct. 19. I have further the honour to acquaint you that a great number of prisoners have been brought in by the constables of this district, all of whom seem to vie with one another to make amends for their late delinquencies by capturing all the people concerned in the rebellion. Amongst others, two ringleaders, Andrew Worgs and William Jones (an escaped prisoner from Morant Bay), both of whom were engaged in plundering and burning the Mulatto River estate, Mr. Hinchelwood's property, were brought in. I assembled a court-martial, and the two men were hung in the middle of this town on the afternoon of the 17th instant. On the 18th instant, took two fresh ringleaders, Smart Sampley and Thomas Peters, both of whom, I believe, will be proven to have taken prominent parts in the murder of Mr. Hire. One of them acknowledges to have taken part in the murder, but says that he was induced to do so by the threats of the others. He also confesses to have taken part in other murders. I have disposed of several other prisoners by inflicting corporal punishment, but still there remains a great number on my hands, and this is swelling every moment."

swelling every moment. It is plain by the report, and by the other despatches of the General, that by rebels who were to be executed, they meant men either taken in arms, or engaged in actual rebellion, or in acts of outrage.

Active movements (*a*) still continued, with a view to supply the loyal with arms and ammunition, and to make provision for the protection of distant districts, and for the attack of the rebel strongholds, and the arrest, if possible, of the leaders, who, it is to be remembered, still remained at large. This was a week after the declaration of martial law.

(*a*) "Having placed Mr. Gordon on board the Wolverine, and having obtained a supply of arms and ammunition from General O'Connor for the use of the Maroons and others, I at once set off again in the Wolverine, about noon on the 17th of October, on my return back to Morant Bay. At dawn of day, on the 18th of October, we entered Morant Bay. A hurried pencilled report from Lieutenant Oxley stated that they arrived at Stoney Gut about daybreak, but that the rebels had disappeared, and the place was deserted. At 11 a.m. (18th October) we weighed anchor and steamed for Port Antonio, where we arrived a little before dark. All was going on well. The reports from Captain Holc's party at Manchioneal were satisfactory, and at Port Antonio itself more volunteers had been enrolled and Maroons had come down and offered their services. Many rebels had been captured, and several courts-martial had been held and capital punishment inflicted. Finding that nothing occurred or was likely to occur to disturb the suitability of the military arrangements which had been made by Brigadier Nelson, in accordance with my requests, I decided upon returning to Kingston, first leaving a memorandum with the Brigadier, specifying the several stations which I desired to be kept and the movements which I wished to be made. We remained at anchor in Port Antonio on the night of the 18th October, and on the following day, after landing and distributing guns to the Maroons and getting on board the Morant Bay prisoners who had been landed here, we left about noon on the 19th Oct. for Morant Bay, Brigadier-General Nelson accompanying me to make Morant Bay his head-quarters for directing further operations from. All was going on well at the camp. The parties from Stoney Gut had returned: more rebels had been captured or shot, and a report had also been received from Colonel Hobbs, who, after reaching Stoney Gut, and finding it occupied by the Morant Bay detachment, had retired again towards Moncklands —a position some distance inland, on the line of the Blue Mountain Valley. Colonel Hobbs had seen and shot a good many rebels, as well as captured some prisoners." (Despatch of Governor Eyre, 20th October, 1865.)

At this time (*a*), although the insurrection at the scene of its original outbreak was checked, the Governor, nevertheless, found, that though danger appeared to be removed in one quarter, it threatened to reappear in others; and he found ample necessity for renewed energy, and, indeed, found that the General in command was actively engaged in directing military measures, and that fresh troops had been deemed necessary.

The accounts received by the Governor (*b*) from the

(*a*) "At daybreak on Monday, the 16th October, a court-martial sat to try prisoners, and twenty-seven were found guilty and hung. Despatches arrived from Kingston from the Executive Committee and from the Custos and Justices, expressing a desire for my return, and urging me to proclaim martial law in Kingston. As there was no pressing necessity for my stay at Port Antonio, I left the Brigadier-General Nelson to complete his military arrangements, and on the 16th set off in the Wolverine for Kingston. Arrived off Kingston by 7 a.m. on the 17th October, I at once communicated with the General, with the Executive Committee, and with the civil authorities of Kingston. Considerable apprehension seemed to be entertained that a rising might take place at Kingston, and reports were brought in that disturbances were apprehended at Linstead, in St. Thomas-in-the-Vale, about fourteen miles from Spanish Town. To guard against this last contingency, I requested the General at once to send off the troops that were in Spanish Town to Linstead, and then later in the day to replace them by troops to be called in from Rock Fort, four miles east of Kingston During my absence the General had, in concert with the civil authorities taken all measures and precautions in their power, by increasing the number of volunteers, both infantry and mounted, calling out the pensioners, and making such other arrangements as were practicable. The General had also sent a detachment of the 2nd battalion of the 6th Regiment from Newcastle across the country to Buff Bay (not a disturbed district), as a precautionary measure. The party sent out originally at my request from Newcastle, under Captain Field, to follow up the line of the Blue Mountain Valley, had been strengthened and placed under the command of Colonel Hobbs in person. From this officer a report had been received, stating his progress up to a place called Moncklands, and a subsequent one announcing his intention to move on Stoney Gut, and take that stronghold. I found also that the General, in addition to the troops written for by me from Barbadoes, had made arrangements for recalling about 200 men from Nassau." (Despatch of Governor Eyre, 20th October.)

(*b*) Thus, on Oct. 17, the General transmitted to the Commander-in-Chief a despatch from one of the officers (Capt. Hole), and said, "I must leave much to his discretion, in whose judgment and decision I place con-

officers in command of detachments, would pass through the hands of the General in active command, and the Commander-in-Chief, and he would receive them, with their express or implied approbation, of the measures taken; the necessity, propriety, or expediency of which, in a military point of view, would necessarily depend upon the aspect of things actually presented in the field.

The reports of the officers (*a*) in command of particular

fidence. He has in every way carried out my orders, and has proved himself, not only an excellent officer, but, what is still more valuable, a man of sound sense and judgment." The report stated to the General that he had found the huts full of plunder, and that he had every house within a quarter of a mile of the road, in which plunder was found, fired, and in doing so upwards of 20 of the rebels were killed. The rebels were firing some of the houses in front, and everywhere fled at an approach. I am of opinion that upwards of 60 rebels were killed yesterday by the troops under my command." If this were under the orders of the General, and in the exercise of what he deemed a sound discretion, and in accordance with military usage, what could the Governor say? The Commander-in-Chief, by transmitting these despatches without comment, must be taken to have confirmed the opinion of the General, and it was a purely military matter.

(*a*) Thus, the following is an extract from Capt. Luke's despatch, commanding first detachment, dated Port Antonio, 16th October, 1865:—"Agreeably to your instructions, I left Port Morant at daybreak on the 13th, with Captain Ross and eighty rank and file of 1st West India Regiment, and marched on Bath. When a mile distant from the village, I received written information that the enemy were on the Rhine estate, where I found several ladies and gentlemen from the neighbouring estate, who had been taking refuge in the hills for three or four nights. A large party of the rebels had been at Bath the previous evening, robbing the stores, but the Maroons coming down in great force saved the lives of many who would most probably have been sacrificed. Passing the Plantain Garden River estate, Captain Ross, who was in charge of the escort, ordered his men to fire on a number of the rebels who were on the hill threatening our party, and several were killed. Hearing there were several gentlemen lying on the Golden Grove estate, I sent a mounted party of men to bring them on; but an alarm being raised of the large body of men on the estate, I ordered off Captain Ross with sixty rank and file, who found a number of rebels with cutlasses, who, on seeing the troops, attempted to escape. Upwards of forty prisoners were made, and several of the rebels were shot. The wounded gentlemen were brought in, and a number of refugees joined our party. On arriving at Bowden Wharf, the refugees and the escort under my command, with the prisoners, were taken on board her Majesty's ship Wolverine. (*vide* Parl. Pap.)

detachments, to the General in command of the forces in the field, stated the particular military measures which had been taken, whether protective, or aggressive, or punitive, and these received the tacit or expressed approval of the General and the Commander-in-Chief, and thus present an authentic account of the military measures deemed warranted, by military authority, under martial law.

On the third day (*a*) after the declaration of martial law, the officer in command of one of the principal detachments sent a despatch, describing his movements and measures, stating the rebellion to be in a great measure crushed in his district, but believed to be in force elsewhere, and stating the trial and execution of a rebel, who had entered

(*a*) It is desirable, as far as possible, to let the official despatches, and extracts from despatches, speak for themselves. The following is from Colonel Hobbs :—"Moncklands, Oct. 16.—I have the honour to report we have been most successful in our advance, and I think, in a great measure, crushed the rebellion in this quarter. The troops under my command have behaved not only with gallantry, but with that order which becomes British soldiers. Private Thomas Murton, of the 6th Royal regiment, captured the rebel chief William Carr, who entered his house in search of Mr. Paterson, with the intention of taking his life. He was tried this day by court-martial, and, after due deliberation, found guilty and shot. This has produced a wonderful effect throughout the district. Since the execution, numbers of rebels have come in, having thrown away their arms, and seeking protection. These men I cannot possibly undertake to guard. They are embarrassing the troops, and I believe they are all worthy of death, but I shrink from the responsibility of executing them, without first hearing your wishes respecting them. I have, however, suggested to the magistrates, that all men of substance, or proprietors of land of 30*l.* or upwards, be sworn in special constables, and ordered to escort these men to Kingston. I hope to-morrow, if all be well, to make a forced march towards Stoney Gut, in this parish, where the rebels, driven due westward by Brigadier-General Nelson, have assembled in great force, and where they have a large supply of gunpowder, arms, &c. As they are all mounted on mules and horses, it is evident we shall have some difficulty in following them up. I do not think the insurrectionist spirit extends into St. David's, where all seems loyal at present. Postscript.—Since the execution of the leader, William Carr, the rebels are coming here in numbers, confessing their guilt, and seeking protection. I have handed them all over to the magistrates, who say they cannot get special constables to guard them, and I have no men to perform the duty."

a house in search of a white person, with intent to murder him, and stating further, that he was embarrassed by the number of prisoners taken.

On the next day (*a*), the fourth from the declaration of martial law, the Brigadier-General in command of the forces in actual service, sent another despatch, describing the movements and measures of a particular detachment, which he described as temperate, and decided, and judicious, and by which all rebels captured were tried and instantly executed, and houses in which plunder was found, razed.

It would sometimes happen (*b*) as it must in all military

(*a*) The second is from Brigadier-General Nelson, commanding in the field, dated Port Antonio, 17th October, 1865 :—"Captain Hole, commanding detachments of 6th Royal and 1st West India Regiments, had arrived at Manchioneal, having carried all before them. The whole of his proceedings were temperate, decided, and judicious. All rebels captured, having been tried, he had instantly executed. In several houses he found plunder secreted, and razed them to the ground, and proclaimed that where he discovered spoil he would adopt a similar course." It is plain, from the distinction drawn between rebels and mere possessors of plunder, that those who were executed as captured rebels, were convicted of having been actually engaged in acts of armed rebellion, that is, of having formed part of those armed bodies of men, who had gone about committing acts of murder, arson, and plunder. It is necessary to compare the terms of this despatch with others, in which rebels who are to be summarily executed, are defined as rebels *found in arms*, or under such circumstances as to make it clear that they had been in arms, and had been actually engaged in acts of outrage or of armed rebellion.

(*b*) "Captain Hole to Brigadier-General Nelson:—Manchioneal, October 19, 1865.—Sir,—I have the honour to report that the detachment, 1st West India Regiment, consisting of twenty rank and file, reached this about 9 p.m., 17th instant, and that on the morning of the 18th instant I detached a party of that regiment, about 50 strong, to proceed to an estate called Friendship, where I had been informed a body of the rebels had assembled; but owing to a mistake on the part of the guide, they proceeded to Hayning and Jericho, and returned by way of Scots Run; they did not encounter any rebels, but found Hayning and Scots Run deserted: they fired the huts, after which they returned to this station. Three men of the 1st West India Regiment got separated from this party, and proceeded as far as the Plantain Garden River district, and from their reports I learn a great number of rebels are lurking in that district. They informed me on their return last evening that they had shot about ten rebels, three of whom were concerned in the murder of Mr. Hire. They brought back with them two cartloads of recovered property, some of which belonged to Mr. Hire (as in

movements, which were necessarily made upon report, that the private soldiers get separated from their officers (*a*), and then perhaps isolated acts of slaughter might be committed, as to which the officers would necessarily be dependent upon the reports they received from the soldiers, and in this way might occur casual acts of this kind, which might or might not be in accordance with military usage, but these were necessarily isolated instances.

At this time (*b*), a despatch was received from the officer in command of a principal detachment, stating the movements and measures he had adopted, and stating that

one of the pockets of a coat I discovered the two accompanying letters), and some to Mr. Shortridge (the same being discovered by the crest on two plated tea-pots)."

(*a*) Despatch from Colonel Hobbs, dated Blue Mountain Valley, nine miles in advance of Moncklands, October 19 (*midnight*).—"Sir,—I have the honour to bring to the knowledge of your Excellency, that I marched at half-past eleven p.m., last night, for the rebel stronghold, Stoney Gut. About daylight this morning, in passing through this village of cross-roads, where the rebels destroyed everything, I found a number of special constables, who had captured a number of prisoners from the rebel camp. Finding their guilt clear, and being unable either to take or leave them, I had them all shot. The constables then hung them upon trees, eleven in number. Their countenances were all diabolical, and they never flinched the very slightest. From this we at once went to Stoney Gut. . . . . This gut or narrow defile is three miles long, and the men were up to their knees in sticky mud, at the bottom of which mud our horses' shoes and ammunition boots were firmly imbedded. After utterly destroying this rebellious settlement, I have returned with my jaded and footsore troops to this spot, where we bivouacked for the night in another ecclesiastical building, called the 'Chigoe-foot Methodist Chapel.' We have plenty to eat, and the few remaining white and coloured people treated us most kindly. Their houses have all been wrecked, and pistols pointed at them. . . . . I must not forget to tell you that I have got Paul Bogle's valet for my guide—a little fellow of extraordinary intelligence. A light rope tied to the stirrup, and a revolver now and then to his head, cause us to understand each other; and he knows every single rebel in the island by name and face, and has just been selecting the captains, colonels, and secretaries, out of an immense gang of prisoners just come in here, whom I shall have to shoot to-morrow morning. One famous leader and murderer, rejoicing in the honoured name of 'Arthur Wellington,' is among them, and three others. . . . . If you can send me some sailors and marines, do so, as there is plenty to do yet."

several rebels had been captured from a rebel camp, and that some, whose guilt was clear, had been executed. The same despatch stated that one of the rebels had been compelled to point out the captains and colonels in the rebel force, out of a large body of prisoners brought in, and who were to be executed at once, as having taken active part in the rebellion, as other parts of the despatch appear plainly to imply.

On the next day (*a*), the General in command in the field sent a despatch to the Commander-in-Chief, stating that he had authentic information that the rebels were still in force in some quarters, and also stating that a court-martial had sat and sentenced several rebels to death, whose sentences he had approved and ordered to be executed, and stating that there were many rebels waiting for trial, who were implicated in the murders.

At the same time (*b*), the General sent orders to the

(*a*) Extract of a letter from Brigadier-General Nelson, to Major-General O'Connor, C.B.—"Morant Bay, Oct. 20, 1865.—I have authentic information that the rebels were in force—what number was very uncertain—but I apprehend 300 will be the maximum; but unless I see for myself, I doubt reports coming from alarmists. During the absence of Her Majesty's ship Wolverine, a court-martial sat here (Port Antonio) and condemned several rebels to death. Having approved and confirmed, the sentences were carried into effect by hanging them on a gallows erected at the junction of the streets and road leading to Manchioneal, and in close proximity to the church. This spot I selected so that the passers-by might profit by the example. I find Her Majesty's ship Wolverine has on board, as prisoner, George W. Gordon, a member of the House of Assembly, and sent to Morant Bay to examine into his case. My return to Morant Bay is indispensable, for many reasons; moreover, there are many rebels waiting trial, who have been implicated in the murders, &c., at the Court-house; and, as the rebellion first broke out there, I have little inclination to prevent delay in bringing them to justice, and, however painful it may be to sign 'death warrants,' yet, if duty commands it, I shall do so without the least hesitation."

(*b*) "Mem. for Colonel Fyfe, Commanding Maroons.—1. The Charlestown Maroons to be furnished with 50 stand of arms, and 1,500 rounds of ammunition. 2. On receiving the arms, the Maroons to patrol along the road, and up the coast, guarding the pass, leaving men in ambush during day, and scouring the woods. 3. The Mooretown Maroons to march according to orders, stationing a guard to watch the Cunha-Cunha pass, and a

officers in command of detachments, to patrol in different directions, when they would be likely to meet with rebels, giving them general instructions that all ringleaders were to be secured, and all men found in arms to be summarily dealt with, so that it is plain he deemed that only those who were *found in arms* were to be shot, and that others supposed to have been active in the rebellion were to be dealt with by court-martial.

Ten days (*a*) after the declaration of martial law, the

sufficient force to protect Mooretown." "Mem. for Lieutenant Adcock, 26th Regiment, A.D.C., proceeding in command of a detachment on field service. The Planters who have volunteered to act with the troops *must be kept in proper order*, though not over strict. On effecting a junction with the party from Manchioneal, Lieutenant Adcock will act entirely on his own judgment, and such information as may be gathered, making excursions in any direction supposed to be advantageous; care to be taken that firing of huts and buildings be not carried to excess; all ringleaders to be secured; men found in arms to be summarily dealt with; minor punishments to be inflicted on the spot. If, by any circumstances unforeseen, the detachment from Manchioneal does not arrive at the Post-office as ordered, Lieutenant Adcock will endeavour to open communication to get it up; but he is authorised to move about as he deems expedient. Mem. — Lieutenant Adcock is not, except under written orders, to conform to the orders of any one but myself."

(*a*) Captain Adcock's despatch:—"Golden Grove, October 22, 1865.—Sir,—I have the honour to inform you, that this morning, at daybreak, I proceeded with 30 men, all mounted, to inspect the country on the north bank of the Plantain Garden River; I first visited Amity Hall Village, every house of which I searched; found a gold watch and an ancient portrait, set in gold, in one house, which house I burned. I then went to Wheelerfield, where I flogged three men and burnt a house in which a quantity of powder was found; thence to Bachelor's Hall Penn, where I was met by a party of Maroons with prisoners, five of whom I flogged; I continued my way to Plantain Garden River Estate Great House, which I found sacked; searched the village near, which was deserted; then visited Winchester Estate Village, which was partially deserted; a little plunder was found; then returned to Golden Grove, where I arrived at half-past three o'clock, and found Ensign Cullen with upwards of 100 prisoners; sent seven for trial to a drum-head court-martial, which I assembled on the spot; six were sentenced to death, which will be carried out to-morrow; I also flogged a few; the darkness, and my own fatigue, prevented me from disposing of the others in this way." Her Majesty's Regulation: I will read it:—"Prisoners are not to be kept in confinement for a longer period than 48

General in command received from the officer in command of a detachment, a despatch stating that he had discountenanced the taking of prisoners, except those who had actually been engaged in the rebellion, and stating that there were 100 prisoners, and that several had been sentenced to death; but as his instructions did not warrant his carrying out the sentence on prisoners brought in by other detachments than his own, he applied for specific instructions, which were sent. The General was particular in his orders to officers, to receive orders only from himself, and to keep their force, especially civilians and volunteers, under military discipline.

So soon as the first efforts (*a*) to check the rebellion were made, orders were carefully issued by the Brigadier to the officers in command of detachments, with a view to restrain depredations, or other lawless acts of the troops; and the terrors of martial law (*b*), which they were upholding against

hours, without having their cases *disposed of*." "I beg to state that I have everywhere discountenanced the taking of prisoners by the Maroons and Constabulary, except those who were actually concerned in the rebellion. I have felt myself compelled to do this, as in many instances it appeared to me that prisoners were arrested from private '*pique*.' I beg further to state that I consider this part of the country free from rebels; and from the information I have received, I think it probable that all, except isolated cases, have gone to the interior towards Blue Mountain Valley; if the rebels were in an organised state, they could with ease have destroyed every man of my party; the bush and cane fields affording such cover as to defy pursuit, and to render precautions against an ambuscade useless with the force at my disposal, without being armed with hand grenades. N.B.—I see by my instructions that I am not authorised to carry out the sentence of death on prisoners brought in by others than my own detachment; I should feel obliged by orders prior to acting in the present case; the evidence against those tried is very conclusive; there will be time for an answer.—W. P. A."

(*a*) "After making all these arrangements, I established my head-quarters at Morant Bay, as being the best place for communication with the different military posts, and with the sea. While at Port Antonio, my orders were:—Captain Luke will issue stringent orders against the troops foraging for themselves. All supplies required to be obtained by written requisitions on the civil authorities at this place."

(*b*) About this time, also, the General issued a stringent order to the

the insurgents, were held over the soldiers if they should transgress their orders.

Within a week after (*a*) the rebellion broke out, the Governor, anxious to unite conciliation with terror, and prepare the way for a termination of martial law, proposed the consideration of an amnesty, excepting actual murderers, but his Council were of opinion that it was far too soon to think of it, and that it would not be safe to do so until more troops had arrived.

In the despatch (*b*) which the Governor wrote to the

officers in command of detachments, that no soldier should be allowed to enter any house except in the presence of an officer, and that for any breach of this order, the offender should be punished by martial law (*vide* order of Gen. Nelson to Lieut. Adcock) ; and it is to be observed, that the soldiers acting under martial law were themselves under martial law, and subject to its swift and summary severities for any excesses.

(*a*) "The Hon. H. Westmoreland to the Governor. Kingston, Oct. 19.—I quite agree with you as to the amnesty, if it excepts those who have robbed as well as murdered ; but it may be advisable to delay it until we have more troops." "Hon. W. Hosack to Governor Eyre. Kingston, Oct. 19.—It is only a week yesterday since the rebellion broke out ; in that time not less than thirty persons have been murdered. *There has not yet been time to develope the feeling of the population.* It, therefore, seems to me that an amnesty, or general pardon, even with exceptions, is premature just yet. The promptness of your Excellency and the troops is rapidly restoring confidence." "Memorandum by the Governor on the letter of Mr. Westmoreland and Minute of Mr. Hosack, dated Oct. 19, 1865.—The remarks made by the Committee in reference to an amnesty, originated in my stating in a note, from the scene of the disturbances, that I thought the rebellion was so far checked and under control that in a very short time an amnesty might be proclaimed to all except actual murderers, who came in and submitted themselves to the Queen's authority. There was no intention or proposal to proclaim an amnesty at once.—(Signed) E. Eyre."

(*b*) Despatch of General Eyre.—"Such is a general and hurried outline of what has taken place up to this evening, 20th October. The narrative has been hastily drawn up at sea in such intervals as I could obtain from other avocations, and amidst the inconveniences of board ship. In the recent case of St. Thomas in the East, the Government had not sufficient warning, and our precautionary measures were too late. I trust, Sir, that you will fully bear these circumstances in mind ; and that, in doing so, you will not regard the just severity which has been exercised otherwise than as a merciful substitute for the much larger measure of punishment which would have had to be executed had the rebellion been allowed time to gather head

Secretary of State, describing the military measures which had been taken for the suppression of the rebellion, he sets forth distinctly what he deemed to be the objects of martial law, and the means and measures which had been taken to carry out these objects; that is, the military occupation of the disturbed districts—the shooting all rebels found with arms in their hands—and the summary trial and execution of all who had been actually concerned in the rebellion, and especially the massacre.' And he stated the result of the measures adopted was to put down the rebellion in the district where it originally broke out, but that it was wide spread, and only kept down in other districts, and ready to burst forth again with fury. And it is to be observed that

and extend itself. 'It is impossible for me to narrate all the various subordinate arrangements for movements of the respective military corps in the field, or of the several detachments sent out from them on special service. It may suffice to state generally that a large number of rebels have been shot with arms in their hands; that a great many prisoners have been tried and hung, shot, or flogged; and that a considerable number of prisoners are still on hand awaiting trial by court-martial. It is difficult to arrive at any correct estimate of the number of people engaged in the rebellion. The districts where it broke out, and into which it spread, are fertile and very populous. Different persons have reported seeing from several hundreds to as many thousands at a time; and Colonel Hobbs reports, in one of his letters, that there were still thousands of rebels around him. No stand has ever been made against the troops, and we are not only in complete military occupation of, but have traversed with troops, all the disturbed districts. We have been singularly fortunate in capturing or shooting a large number of the principal ringleaders in the rebellion, and many of whom were personally concerned in the atrocious butcheries on the 12th October at the Morant Bay Court-house, or in the subsequent destruction of life and property further to the eastward, as the rebellion extended in that direction. Very many acknowledged their guilt before execution. It is a remarkable fact that, so far as we can ascertain, the rebels at Morant Bay did not proceed in any considerable numbers to the adjacent districts, but the people of each district rose and committed the deeds of violence and destruction that were done within it. This fact shows how widespread the feeling of disaffection is, and how prepared the people of each parish were to catch the spirit and follow the example of their neighbours. It shows, too, the extreme insecurity which yet exists in nearly all the other parishes of Jamaica where the same bad spirit prevails. In the lately disturbed districts the rebellion is crushed; in the others it is only kept under for the present, but might at any moment burst into fury."

the very same despatch already showed that it was only kept down by the terror of that military power, which was still but small, and had not yet been reinforced.

The policy even of an amnesty would depend upon whether the principal leaders and worst offenders had been captured or were still at large, and whether their spirit of insurrection was still determined or subdued; and it would be important that the active ringleaders, who were still at large, had still a determined design for the extirpation of the whites, and inciting to a "war" against the whites (*a*); "colour for colour," as they expressed it; urging *every black man to turn out at once;* couched all through in terms which showed a most determined spirit, and clearly showing that the rebellion was, indeed, only kept under, and might at any moment break forth with fresh fury. The snake, in fact, was "scotched not killed."

The actual insurrection having been subdued in the course of a week, the continuance of martial law three weeks beyond that time, and the nature of the measures

(*a*) On the 17th October, the following letter, signed by the ringleaders, they being still at large, was found by Captain Oxley, an officer in command of one of the detachments:—"Mr. Graham and other gentlemen,—It is time for us to help ourselves skin for skin. The iron bar is now broken in this parish. The white people send a proclamation to the Governor to make war against us, which we all must put our shoulders to the wheels and pull together. The Maroons sent the proclamation to meet them at Hayfield at once without delay—that they will put us in the way how to act. Every one of you must leave your house—take your guns; who don't have guns, take cutlasses. Down at once! Come over to Stoney Gut, that we might march over to meet the Maroons at once without delay. Blow your shells! roule your drums! house to house; take out every man; march them down to Stoney Gut; any that you find take them in the way; take them down with their arms; war is at my black skin; war is at hand from to-day till to-morrow. Every black man must turn out at once, for the oppression is too great. The white people are now cleaning up their guns for us, which we must prepare to meet them too. Cheer, men! Cheer in heart; we looking for you a part of the night or before daybreak.—We are, yours truly, (Signed) Paul Bogle, B. Clarke, J. G. M'Laren, P. Cameron. Get a bearer to send us an answer to this, for they determine to make us slave again. When you do come to Stoney Gut or Hayfield, blow your shells and tell what place you in from before entered.—E. K. Bailey."

adopted, so far as disclosed in the military reports, raised questions as to the objects with which martial law, in such a case, required to be kept up and carried out.

The necessity for declaring martial law originally, the propriety of its continuance, and the nature of the measures to be adopted, would necessarily depend mainly on the particular character of the danger to be met; and, from the first, the Governor (*a*) was well aware that the danger, after the first few days, would be, not in encounters with bodies of armed rebels, but in their taking refuge in inaccessible fastnesses, where it would be difficult for troops to follow them, and where, under the ordinary system of peace, they might set the law at defiance, and renew the insurrection at pleasure.

This danger, the sense of which would, it is manifest, keep the colony in a perpetual state of apprehension and alarm, fatal to the peace and confidence, it is the great object of martial law to restore, would be the danger against which the operations of the troops (*b*) under martial law would

(*a*) Despatch of Governor Eyre to the Secretary of State, November 2:—"His Royal Highness should be made aware that in a country like Jamaica, with an immense area, uncertain and slow intercommunication between the different parishes (always too liable to interruption, especially at this season of the year, by floods)." So in Governor Eyre's letter to the Governor of Barbadoes, October 14:—"It may be as well to bring to your Excellency's notice, as an additional reason for this urgency, the immense area of Jamaica, extending about 150 miles in length, and from 50 to 60 in breadth, and the physical features of which are of such a nature as at once to prevent a rapid intercommunication with distant points, and render exceedingly difficult all inland movements of troops, whilst they afford both shelter and supplies of food to the insurgents in fertile fastnesses of the mountains, where a large portion of the peasantry reside."

(*b*) Hence, as stated by Brigadier-General Nelson, in a despatch to Major-General O'Connor, dated November 20, 1865:—"The Maroons, under the skilful leading of Colonel the Honourable A. G. Fyfe, contributed greatly towards the suppression of the rebellion. The peculiar nature of this force permitted of the mountains being searched, and with the Maroons rests the honour and credit of capturing the principal ringleader of the rebellion, Paul Bogle, who was only caught after a whole day's breaking of the bush." So, in one of the reports of Colonel Fyfe to Brigadier-General Nelson, dated Bath, November 2, 1865:—"As reported,

be properly directed; and not merely to the encounter, of armed bodies of rebels in the field, where they would take care, of course, not to be met with.

Indeed, the danger lay not in the meeting of armed bodies of rebels, but in the not meeting them; for, as there had clearly been some thousands actively engaged in the acts of rebellion perpetrated, of course they must be somewhere; and, if they were not met with openly, there was reason to suppose them to be in the woods, and hence the most important and arduous duties of the troops, and their most important and successful measures, lay in scouring the woods in order to drive in, and capture, those who were lurking there, to renew the insurrection.

It is to be observed, that at the first declaration of martial law it was predicted, and pointed out (*a*) by persons of experience, that the black population who were implicated in the rebellion would betake themselves to the natural

I despatched a party of Maroons on the 31st ultimo, *to scour the woods* near Moncklands. After finishing my despatches, in order to *test the tranquillity of the district*, I started, attended only by a servant and a boy prisoner as a guide, taking the road through Spring Serge Island, Garbrand Hall, thence through the woods to Moncklands. On arriving at Moncklands I found the Maroons there. They had seen no traces of runaways in their beat, Captain Field and his gallant band having performed their work so thoroughly as to have left nothing for the Maroons to do. As there were several prisoners at Moncklands, Captain Field requested me to order a court-martial. This was done early the next morning: two to be shot, one to receive 100 lashes."

(*a*) "Major-General Jackson to Governor Eyre. Mahogany Vale, October 31, 1865.—I deem it my duty to report to you, that the remnant of the rebels of St. Thomas in the East are retreating by routes I pointed out some ten or twelve days ago they would take, namely, through St. David's into Port Royal, and then *via* the Yallahs River, northward, into the fastnesses of St. George's, &c. By the first route, viz., the Yallahs River, after passing Mahogany Vale they have every facility, both from the nature of the country, settlements of blacks, and tenantry on thrown up properties, to escape into St. George's by St. Helen's Gap, miles from any police-station. By the second route, through *very strong defiles* into Dallas; 2nd, *via* Barbecue River, north of Bloxburg, *through strong defiles* by Trafalgar Gap, and then south of Ross Valley, by blind paths into Dallas. Yesterday four of the fugitive rebels from St. Thomas in the East were captured."

fastnesses which the nature of the country afforded, forest and bush, mountain and defile, and that thence would arise a far more formidable danger than that of an encounter in the field, viz., the *lurking* of rebels in these fastnesses; ready to rush forth when the military should be withdrawn, and renew the insurrection.

From the first (*a*) the civil or military reports received pointed to this danger; for, although bodies of hundreds of armed rebels had risen, and committed outrages in different and distant places during the first few days, they then suddenly for the most part disappeared, and fled from their villages, which were found vacant and deserted, into the woods, where they could lurk in safety.

Hence also, although the military reports (*b*), received

(*a*) "Report of Lieutenant-Colonel Hobbs, Stoney Gut, Paul Bogle's Chapel, the Heights, October 19, 1865, 9·30 a.m.—I have reached Stoney Gut from my head-quarters, Moncklands, having shot a number of rebels on the way. Stoney Gut I found *vacated by the rebels*, but occupied by a party of seamen, marines and artillery, who arrived here at daybreak yesterday. *The rebels have fled towards Somerset and Mount Lebanon.* As this is close to me, and Paul Bogle supposed to be near Moncklands, I retire in that direction, bivouac where I can, and march early to-morrow, as there is abundance of work cut out for me. I have directed this rebellious settlement to be utterly destroyed." Mr. Kirkland, dated "Bath, October 17, 1865.—The want of fire-arms prevents my sending out detachments of Maroons *into the woods in search of the rebels.* I am happy to say we have ammunition, but arms are required. I would recommend a supply of them being sent by a party of Maroons." It will be found that after this, by means of the employment of the Maroons, a native force admirably adapted for mountain service, for searching the woods, the active ringleaders were captured, not without immense difficulty, and beating the bush for days, and then for the first time the rebellion began to be suppressed.

(*b*) Report of Colonel Fyfe, 24th October.—"On arriving at Bath the reports about Torrington were confirmed. The place is cut up into small freeholds on the tops and sides of crumpled hills, extending from the Plantain Garden River to the hills to the south of Morant Bay. I therefore moved early yesterday morning to the place. On ascending about a mile and a half up the hills some six or seven shots were fired at the party in advance, wounding one Maroon slightly. Nine of the rebels were killed. (21st October.) We then advanced, burning all the houses, but leaving a small out-building at each place to shelter the women and children.

even as late as the end of the month, described encounters with armed bodies of rebels, the real danger lay in the fact that they were so rarely thus met with, but preferred lurking in their natural fastnesses, where it was so difficult to follow them, and where, if not dislodged, they could remain secure until the military force was withdrawn, and whence, only the military force, under the powers of martial law, could possibly dislodge them.

The reports (*a*) received at this period, both from civilians and officers, which were the only grounds on which the Governor could act, pointed to this danger; the danger of rebels lurking everywhere in the woods, and ready to renew

Directing the main body of Maroons to put themselves in the hills for the night, I started to meet the second party, as concerted. These arrived about ten minutes after me, stating that they had not seen a living soul in their march of thirty-two miles, except one man just before they came in. I have little doubt, unless some pressing emergency shall arise, that the whole of this valley will be the best working ground for the Maroons for a time. I believe this to be the *chief nest of the rebels*, and if we hunt them out, and they take to the woods, they are sure to be taken, as the Maroons hunt by the track, and nothing can escape them off the roads." It will be observed, that in a march through a populous district (for from Torrington a large body of armed rebels had gone to raise the insurrection), not a single person was seen in a march of thirty-two miles. The inference to be drawn from this was, that the rebels were lurking in the woods; at all events, that inference *was* drawn by those on the spot, and it seems a fair one. So Colonel Hobbs, in his report of 19th October, says:—"Three men went to Plantain Garden district, and from their report I learn that a great number of rebels are lurking there."

(*a*) "Mr. Guscott, J. P. Buff Bay, October 18—23, 1865.—We have sent on several prisoners from here and Metcalfe to Port Antonio. I beg to suggest to you that a detachment of Her Majesty's troops should remain here during the continuance of martial law. I consider that nothing but their presence has kept matters here quiet. From information received, a number of the rioters from St. Thomas in the East are now lurking at White River, and in the African houses on your estates, and other parts of the parish. Two other threatening letters were found in the Court-house yard this morning." Capt. Holo, in his report of 19th Oct., stated that three men, who had been in the Plantain Garden district, brought in a report that a great number of rebels were lurking there. So Col. Hobbs mentioned in one of his reports, that he came upon a body of some 300 in the bush, and similar passages abound in the reports.

the insurrection when martial law should be stopped, and the military be withdrawn. And the belief founded on these reports, that there was almost universal disaffection in the island, and the very fact, that though thousands of negroes had been engaged in the insurrection, so few of them could now be met with, would afford the strongest grounds for these apprehensions.

With reference to the particular measures taken by the officers in command of detachments, all that could be known by the Governor, would be what appeared upon the face of their reports. It must be borne in mind, with reference to the military reports received from the officers commanding detachments, that it appeared upon the face of reports (*a*), that they had been forced to act separately, and suddenly, on the moment, without mutual communication, not knowing the force of rebellion elsewhere, and reduced to act on mere rumour or report, often incorrect and exaggerated, and which might lead them to fancy the emergency graver, and the danger greater, than it really was.

Then, further, it is to be observed, that the reports being hastily written, often in terms general and indistinct, it would rarely, if ever, appear on the face of the reports, that the killing of men in the disturbed district was not, under the circumstances, justified by military usage (*b*), so that the

(*a*) Many instances of this will be observed upon careful perusal of these reports (*vide ante*), and indeed it is believed, that there is hardly one of them which does not refer to information received, in the way of loose rumour or report; and it will be noted that each detachment was sent in a different direction, at a distance from the others, and each officer had to act on his own impression of the state of the district, and his own judgment necessarily formed on that impression (*vide ante*, p. 142). It was admitted by all parties, that the question of humanity must depend upon necessity, and that must mean apparent necessity, and that would turn upon the sense of danger and the impression of the rebellion derived from rumour (*vide* the despatch of the Secretary of State on that point).

(*b*) Which, it is conceived, would be the only question to be considered then or at any other time, supposing the declaration of martial law lawful. This necessarily follows from principles already laid down, for it is the declaration of a state of war, and the establishment of absolute arbitrary

military commander could not by express or tacit approval be deemed committed to approbation of any acts of homicide not so justified. And it would be almost impossible to gather from any of the reports that there had been any such acts.

Even assuming that it appeared, on the face of the military reports, that men, unarmed and unresisting (*a*), were shot or summarily executed, although that, no doubt, at common law, when the troops are acting merely in aid of the civil power, and under subordination to ordinary law, might be murder, it would by no means follow that it was so under martial law, which establishes absolute arbitrary military power, under which men might be so executed as rebels; and there might be cases in which it might be necessary or justifiable to kill *rebels*, even under such circumstances (*b*).

military rule, as in time of war, with this difference, indeed, that rebels, being subjects, cannot be lawful belligerents against their sovereign, and cannot be entitled to any rights as belligerents, and being *prima facie* in a state of rebellion, on some proof of actual participation in rebellion, it would be a matter of military usage and expediency, whether, when taken, they should be executed. And though, no doubt, acts of homicide wholly unnecessary could not be really expedient, but would be as contrary to policy as humanity, as tending to drive the population into desperation; the question of necessity or expediency would be one of military exigency, upon the circumstances they appeared to the military officers at the time, and according to military usages, and it would not necessarily follow from the statement that so many men had been shot or hanged, that they were improperly executed.

(*a*) Thus, where Sir Francis Burdett had said of the conduct of the troops, on the occasion of what was called the Manchester massacre, that the troops had killed men, unarmed and unresisting, and had cut down and trampled upon women; the court said, "If this were done; if unresisting men were cut down, whether by troops or not, it is murder, for which the parties are liable to be tried by the law of the country." (Abbott, C. J., 4 B. & Ald. p. 323). "At all events it would import a crime, which might be either murder or manslaughter, according to circumstances." (Best, J. *ib.* p. 327). That, however, was not under martial law, but the military were only acting in aid of the civil power under the common law, it was *not* martial law, under which rebels may be dealt with summarily.

(*b*) For instance, unarmed men might be attacked and shot, at a distance,

And further, as regarded the Governor, to whom these reports were transmitted by the General in command, through the Commander-in-Chief, he would receive them after they had passed through their hands (*a*), and came to him with their express or implied approval (*b*), and it would be difficult for him, on a hasty perusal, amidst circumstances of great distraction (*c*), to undertake to overrule their judgment on a matter so necessarily military in its nature, and censure officers for unjustifiable acts of homicide, on mere general statements.

That the Commander-in-Chief, to whom all military reports were transmitted, considered that they were submitted previously to himself, and that it rested with him to review them, was manifest from this—that they were, as a general rule, transmitted by him to the Governor (*d*), and that

as supposed to be in arms, though, as it turned out, not *actually* armed; or, again (as actually happened in this Jamaica case), a woman lurking in the bush, or at night, might be taken for a combatant waiting to fire. It is very difficult to lay down any fixed inflexible rule as to what would be unjustifiable homicide under martial law, though no doubt, the general rule would be as above stated. But the Governor, in hastily reading reports which came to him, through superior military commanders, could scarcely say that what they had passed over or approved, was culpable.

(*a*) *Vide ante*, p. 144.

(*b*) *Vide ante*, p. 130.

(*c*) Circumstances which, were, with great candour referred to by the Secretary of State, as reasons for a considerable degree of latitude and indulgence in considering the reports themselves, and the silence of the Governor or the Commanders as to their contents. As to sentences of court-martial, he would have a right to, and be bound to, assume that they were right; and as to killing of men in the field, in the presence of officers, he would be entitled to, and bound to, assume that they were deemed proper by them upon military considerations; and if so, how could he, who was not present, overrule their judgment, and hold them criminal?

(*d*) Letter from the military Secretary of the Commander-in-Chief, to the Governor's Secretary, dated Kingston, Jamaica, October 24, 1865.—"I am directed by the Major-General commanding, to reply to your letter of this day's date, requesting to be furnished with a further report from Colonel Hobbs, and have the honour to state, for the information of his Excellency the Captain-General, that the report alluded to containing the statement

he assumed the power of withholding any with which he was not satisfied, or not being sufficiently clear or explicit.

It was the opinion of the military Commanders that the supreme command, in a district, under martial law, was vested in the superior military Commander, at all events, as to all actions of the military, including convening of courts-martial and trial of prisoners. Although, in accordance with the instructions issued from the Colonial Office and the War Office, the Governor had concerted with the General in command, the dispositions and general arrangements of the troops, and their movements, and the general nature of the measures to be adopted; the *particular* measures, as already stated, were necessarily left to the discretion of the officers commanding detachments, and he could not be responsible for acts done under these orders, in the exercise of that discretion (*a*).

that "thousands of rebels are round him," is not considered by the Major-General to be at present sufficiently authenticated, to warrant the assumption that such is *de facto* the case, and which the Major-General sincerely trusts may not eventually be substantiated; he considers, therefore, that it would create a premature alarm as to the position of the troops at that quarter, were he to despatch the report in question." This shows that the Commander-in-Chief examined the reports, and would have sent back any which, in a military point of view, he considered was satisfactory. The statement in this report as to thousands of rebels was, no doubt, an inference drawn from the fact, that the Colonel was in a district in which there were thousands of able-bodied negroes, none of whom came forward to co-operate on the side of loyalty, and all of whom, therefore, were presumably implicated in the rebellion, added to which, there was the fact, that parties of several hundreds being engaged in outrages, at different and distant places, there must have been some thousands *actively* engaged in the rebellion. And the report was sent back, evidently not because the Commander-in-Chief doubted the statement in that sense, but because it had hastily been couched in such a form as would carry the impression that there were thousands of rebels in the field, which might have been misinterpreted, and thus have caused apprehension.

(*a*) Letter of Lord de Grey, War Office, December 1, referring to a former letter of Nov. 20.—"It is there laid down that, as the supreme authority in each colony is entrusted to the Governor, it is for him to determine the general nature of the operations to be undertaken by Her Majesty's troops, for the suppression of rebellion, and to order such steps as the safety and welfare of the colony may appear to him to require to be taken by the

With regard to the trial of prisoners by court-martial (*a*), as the authority to convene a court-martial would be military, it rested entirely with the General in command, who on several occasions accordingly declined to order courts-martial to assemble at the Governor's request, where he deemed the evidence not sufficient, or the case not within military cognizance.

Commander of the forces; while it is the duty of the officer in command of the troops to obey such orders as he may receive from the Governor, and to adopt such military measures as may be best calculated to give effect to them. If the officer in command of the troops should feel any objection, upon military grounds, to the measures ordered by the Governor, he is entitled, and it would be his duty, clearly to make known those objections to the Governor; but if the Governor, upon his own responsibility, should think fit, in spite of these objections, to adhere to his original orders, it would then be the duty of the officer in command of the troops to make the best military dispositions in his power in order to carry them out." But this was only as to the *general* nature of the military operations, and the Governor, in a despatch to the Secretary of State, Dec, 8, stated that while all the *general* arrangements for the suppression and punishment of rebellion had been made under his own directions, the *subordinate* details, and the internal management of the districts under martial law, including the appointment of courts-martial, the trial of prisoners, the approval of sentences, and the carrying of them out, rested entirely with the military authorities.

(*a*) "Major-General O'Connor to Governor Eyre.—Head-Quarters, Kingston, November 1, 1865.—In reply to your Excellency's letter of the 31st October, 1865, requesting that a Military Court may be assembled at Port Royal to condemn the schooner "Oracle" for landing goods shipped for exportation, I have the honour to inform your Excellency that I consider it is not within my province to try a vessel by a Military Court, and am of opinion that it comes more within Admiralty jurisdiction." Major-General O'Connor to Governor Eyre.—"Head-Quarters House, Kingston, October 25, 1865.—I have the honour to bring to the notice of your Excellency that there are now at Up Park Camp seventy-five civil prisoners, sent there for safe custody by the surrounding magistrates and the authorities of Kingston. Against many of these prisoners there appear to be no charges or evidence, nor even documents connected with them in any way. Where they exist courts-martial at once deal with the offenders; but with regard to the others, I would desire your views as to their disposal, their maintenance alone being a great expense to the colony." Again, Oct. 31, same to same. —"Some days ago, by my direction, Lieutenant-Colonel Elkington, Deputy Adjutant-General, called upon Colonel Hobbs, 2nd battalion 6th Royals, for a list in detail of all prisoners captured by that officer while engaged in

With reference to the disposal of the cases of prisoners (*a*), the directions of the Governor were, that care should be taken to prepare and consider the evidence in each case, and to dismiss all against whom "serious crimes," or an active participation in the rebellion, could not be substantiated. But, whether or not there was sufficient evidence to warrant their being put upon their trial before court-martial, and whether courts-martial should be convened—which could only be made under the supreme military authority—were matters for the military Commanders to determine.

How, entirely the military Commanders assumed the responsibility of putting prisoners on their trial, and how carefully and accurately the General in command considered the question of the jurisdiction of the courts-martial, with reference especially to the offences of which they could take cognizance, was shown by this: that he drew, with the assent of the Commander-in-Chief and the Governor, a distinction between the offence of merely speaking seditious language prior to the rebellion, and the offence of complicity in the rebellion, which he rightly deemed to be a continuing offence, having a continuing effect and operation; and, therefore, involving a continuing liability to martial law; and though they did not, be it observed, deny the

the field; their offence, evidence, and every particular connected with each case. When furnished with the necessary documents I will give instructions for the suggestion conveyed in your Excellency's communication, to be carried into effect."

(*a*) "Governor Eyre to Major-General O'Connor.—October 30, 1865.—I would beg to suggest that Colonel Hobbs should be requested to furnish all the evidence he can, either written or oral, against each and all of the prisoners sent in under his authority; and in the event, after such a reference, of no sufficient evidence being procurable, to try them at Up Park Camp, I would recommend they should be sent to Morant Bay for identification. If on arrival there, no evidence of serious crime was obtainable, they would, as a matter of course, be released; and it would be better, if this has to be done eventually, that the release should take place at Morant Bay, and not at Kingston. You will be good enough, therefore, to take care that all such prisoners from Up Park Camp as, upon the examination aforesaid, you *consider ought* to be sent to Morant Bay for trial, be forwarded to Port Royal as early as practicable, and that the inspector

power, they did not see the necessity or expediency of exercising it in the former case (*a*).

This view was assented to (*b*) by the Governor, expressly upon the assumption that there was no evidence to convict

of police be sent down to select those among the prisoners who, *you consider*, should also go. The evidence available should, of course, in each case accompany the prisoner. Those prisoners sent in by Colonel Hobbs, or his party, should not be sent on until after Colonel Hobbs has reported the grounds of their capture, and the evidence he is able to produce. P.S.—If any of the prisoners sent in by Colonel Hobbs, or the party of the 2nd battalion 6th Regiment, were taken in arms or with stolen property in their possession, the parties who captured them should appear before the Courts to give evidence against them. It is only the captors who can declare the grounds upon which the captures were made."

(*a*) "Brigadier-General Nelson to Major-General O'Connor.—Head-Quarters, Morant Bay, November 4, 1865.—Having deemed it my duty to refer a case of one of the prisoners sent up for trial, in order that I might be informed on certain points connected therewith, so that the decision on such case might be my guide as to the disposal of the cases of the prisoners, and having just had the honour to receive your opinion on the several points submitted, I have arrived at the decision that on my own responsibility I do not consider myself justified in arraigning these prisoners before a court-martial. My reason for thus doing so is—these prisoners all uttered the sentiments which are said to be seditious, prior to the rebellion; and though I may have the power and authority under martial law (a power to myself very doubtful), yet it is a power I do not feel myself justified in exercising, and which I shall not exert unless I receive positive orders so to do. The prisoners shall be kept under surveillance till your instructions respecting their disposal be received."—"I entirely coincide in the opinion of Brigadier-General Nelson. We may have the authority and power, but would not be justified to try the prisoners by a military court-martial. (Signed) L. Smythe O'Connor. Head-Quarters House, November 5, 1865."

(*b*) "Governor Eyre to Major-General O'Connor.—King's House, November 6, 1865.—I assume that in coming to this decision, Brigadier Nelson has satisfied himself in each case that there is no evidence directly connecting the prisoners with the immediate outbreak in St. Thomas in the East, and in this view of the case I consider Brigadier-General Nelson has exercised a wise and just discrimination in coming to the determination he has done." This must have meant the rebellion, not the particular outbreak, for that was prior to martial law. What the Governor meant was, what the General had expressed in a communication to the magistrate, viz., that there was no complicity in the rebellion. It was only by connection with the continuing rebellion that complicity in the outbreak, which was before martial law, would differ from seditious language prior to martial law, not connected with the rebellion.

the prisoners, whose cases were in question, with the outbreak of rebellion, the case of seditious publication, not connected with the rebellion, being carefully distinguished from that of seditious acts connected with the causing of the rebellion, and amounting to complicity with it.

It was at this point in the case that the prisoner, supposed to be the real author of the rebellion, was ordered by the Governor to be arrested out of the district in which martial law was declared, and to be taken to the district (*a*), with a view to his trial there.

And, as this case was made one of the main grounds of the issuing of the Royal Commission of Enquiry, and is of great importance, as illustrating every point which can arise on a trial by court-martial under martial law, it deserves an attentive consideration, with careful reference to the respective parts taken by the various persons concerned in the matter, whether as to the arrest of the prisoner, the putting him on his trial, or his trial and conviction, and subsequent execution.

(*a*) It is of especial importance, in considering this case, and any other case of trial by martial law, to bear closely and carefully in mind the particular acts for which the various parties concerned, and for which they may be respectively responsible. The Governor, whose order was the direct cause of the arrest, imprisonment, and removal to the proclaimed district, would not be liable for anything else than that, and would only be liable legally for it, if illegal. The military commanders, it will be found, assumed the whole responsibility of putting the prisoner upon his trial, they alone having authority to convene a court-martial for the purpose, they asserting that sole authority by declining, in cases in which they considered that a court-martial would not have jurisdiction, to allow the prisoners to be put upon their trial. They, again, assuming the trial to be lawful, would not be responsible for the verdict nor its confirmation, unless, at all events, it was manifest that there was no evidence on which a court-martial under martial law could possibly act. The court-martial, again, would not be liable for their discharge of a judicial or military duty thus imposed upon them. It is the more necessary to direct attention to this distinction, because there was a disposition to make the Governor responsible for the execution, which, it is conceived, he could not possibly be, unless there was either an utter want of jurisdiction, or a conspiracy, by false charges and colourable trial, to effect a murder.

The Governor (*a*), in a despatch which he wrote immediately afterwards to the Secretary of State, set forth the grounds and reasons on which he had ordered the arrest, and avowed his responsibility for it,—that is, for the act of arrest, and the removal of the prisoner in custody into the proclaimed district, upon the charge of having caused or incited to the rebellion there.

For that act (*b*), and that act alone, the *Governor* would

(*a*) "Despatch of Governor Eyre, 20th October:—There was one very important point to be decided upon. Throughout my tour I found everywhere the most unmistakeable evidence that Mr. George William Gordon, a coloured member of the House of Assembly, had not only been mixed up in the matter, but was himself, through his own misrepresentations and seditious language, addressed to the ignorant black people, the chief cause and origin of the whole rebellion. Mr. Gordon was now in Kingston, and it became necessary to decide what action should be taken with regard to him. Having obtained a deposition on oath that certain seditious printed notices had been sent through the post-office, directed in his handwriting, to the parties who have been leaders in the rebellion, I at once called upon the Custos to issue a warrant, and capture him. For some time he managed to evade capture; but, finding that sooner or later it was inevitable, he proceeded to the house of General O'Connor, and there gave himself up. I at once had him placed on board the Wolverine for safe custody and conveyance to Morant Bay. Great difference of opinion prevailed in Kingston as to the policy of taking Mr. Gordon. Nearly all coincided in believing him to be the occasion of the rebellion, and that he ought to be taken; but many of the inhabitants were under considerable apprehension that his capture might lead to an immediate outbreak in Kingston itself. I did not share in this feeling. Moreover, considering it right in the abstract, and desirable as a matter of policy that, whilst the poor black men who had been misled were undergoing condign punishment, the chief instigator of all the evil should not go unpunished, I at once took upon myself the responsibility of his capture."

(*b*) There is a material, a vital, distinction, between legality of arrest, or of custody, and legality of trial. A man may be illegally arrested, or even in illegal custody, whose *trial* and capital conviction may be perfectly legal. Put the case of a man who is illegally arrested in one county, and taken into another, where he is kept in illegal custody, but tried for a murder there committed, and convicted. This trial would be perfectly legal, although his arrest or custody was illegal. (*Vide ante*, p. 103). So, in Gordon's case, even although the act of the Governor in arresting him, and sending him to the proclaimed district, was illegal, yet the trial was perfectly legal, the charges being of offences *committed within* that district, where, alone, he could be tried upon such charges. And as—the verdict

be responsible, not for the trial, still less for the result of the trial, least of all for the execution of the sentence, for the trial took place under, and was ordered by, military command, and the verdict was the act of the court, and the execution of the sentence an act under military authority, which it was only competent to the Governor to *prevent*, if he saw sufficient ground for so doing. The arrest, and the arrest alone, was that part for which he was responsible. The trial was an act of the supreme military authority, as it took place under martial law.

Although, as the Governor would only be responsible for the arrest; and the illegality of the arrest, even supposing it illegal, would not in the least affect the legality of the trial, and the putting him upon trial (*a*) was the act of the Commander of the Forces; yet, on the other hand, the arrest would be *equally* lawful, supposing the prisoner triable at *all* in the district to which he was removed, whether by martial law or at common law, as he must have been triable there, *either* at common law *or* by martial law, if he was party to an offence committed there.

It is conceived that, even assuming that the prisoner was not subject to trial by *court-martial* in the proclaimed district, the Governor could not possibly be liable

being the act of the court—it must be assumed, as regards the Governor, to have been right, he is not responsible for the result.

(*a*) The putting him upon his trial would not be, and it is plain was not, the necessary consequence of his arrest and imprisonment within the district under martial law. The arrest was equivalent to the act of a Secretary of State in issuing his warrant to apprehend a person on a charge of treason or sedition. (*Vide ante*, p. 33.) That has nothing to do with trial; the evidence may be found not sufficient, and the person may be released or detained, as the case may be. But under martial law, the district being under military command, the act of putting a person upon his trial would be the act of the supreme military authority, for a court-martial would only assemble under that authority. The Governor acted only as the executive authority in making an arrest,—he had nothing to do with his trial. Hence, as a matter of fact, it was the Commander-in-Chief to whom information was furnished as to the prisoner's guilt, and it was the Commander of the Forces in the field who put him on his trial.

for his arrest and transmission to that place, for several reasons; first, because, at all events, he was legally liable to be tried there, whether by martial law or not, if he had incited the people there, or had conspired to incite them to rebellion, which would be an offence *committed there* (*a*); secondly, because, whether he was triable by court-martial or not, it would be for the military Commanders to determine; and lastly, because, whether or not he had committed an offence charged to have been committed within the district, it would be for the court to determine. So that, as the Governor could not be liable for the arrest, unless it was illegal, so it would not be illegal if there was reason to believe the prisoner had committed an offence there, and if he *might* in law have committed an offence there, although not personally there.

It was enough, to warrant the arrest, that there were facts upon which it might be supposed that the prisoner might be liable and triable in the place to which he was sent, as if it were supposed that he had been a party to a conspiracy (*b*),

(*a*) Because, though, for the mere publication of a seditious libel, the man may be indicted where he published the libel, and there may, in strict law, be a publication by merely sending a paper through the post or otherwise, for publication elsewhere, he may equally be indicted in the place where he sends it to be published, by putting it forth to the people. (*The King* v. *Burdett*, 4 B. & Ald. 172.) But in case of *sedition*, or inciting to sedition, or conspiring to incite to sedition, the indictment must be where the sedition was raised, or where the people were *incited*; and in the case of conspiracy or treason, it may be where any of the acts are done, either by the prisoner, or any of his conspirators. (*Ibid.*) Even according to the strictest rule of common law as to felony (which, indeed, was not quite settled, it was so technical and difficult of application), it was laid down that a man who had incited to a murder in another county, might be indicted where the murder was committed. (*Ibid*, p. 174.) And the rule, strict and technical as it was, did not apply to conspiracy; and thus, a man who entered into a conspiracy in one county to indict a man falsely, and followed up by an indictment in *another* county, might be indicted in *either* county. (*Ibid*, p. 176.) And then, in cases of conspiracy, there is this peculiarity, that, as the prisoner may be liable for the acts of any of his co-conspirators, in furtherance of the unlawful object, so he may be triable in any place where any such act has been committed. (*Ibid*, p. 178.)

(*b*) There is no reason why the crime of conspiracy may not be tried

with other parties, active ringleaders in the rebellion, to incite the people in the disturbed district to rebel, then he would be liable, if a party to such conspiracy, where any of the others used such incitements, or did any acts in furtherance of their common design.

Nothing, however, is more clear (*a*), than that, if the

where one distinct overt act of conspiracy is committed, as well as the crime of treason. Where no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given in the county where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other counties, still, the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was holden to be satisfied by even acts done by some of them, in prosecution of the conspiracy, in the county where the trial was held. The instances of treason are well known, and they go this length, that a witness to an overt act in the county, where the indictment is preferred, is sufficient." (*King* v. *Burdett*, 4 B. & Ald. 178.) In the same case, the rule itself, requiring that in felony the whole of the facts making the felony must have been proved in the county where the case was tried, was deemed a technical rule of the common law, which had caused failures of justice; and if it applied to the case in question at common law, it would not be applicable to trial by court-martial, but it would *not* be applicable to the case in question, as it was, it will be seen, dealt with as one of conspiracy.

(*a*) The general rule of law is, that crime, as to its trial, is local, and hence in a well-known case, Heath, J., referred to a case where a criminal was arrested in England, for a capital felony, created by an Irish Act of Parliament, and upon such arrest was carried away to Ireland, tried, and executed for the offence. He asked whether the prisoner in that case, if he had been acquitted, could have maintained an action against those who arrested him, supposing he were taken on probable grounds (*Mure* v. *Kay*, 4 Taunt. rep. 37). And it was there laid down, that if a person has committed a felony here, he may be arrested in Scotland or Ireland on probable grounds of suspicion, at all events, if the law of those countries warrants such an arrest. Hence it was necessary, by a special statute, to provide for the trial here of offences by Governors committed abroad (*vide ante*, p. 52), otherwise they must have been tried in the colony abroad. The first case cited was very strong, for the offence (stealing an heiress), was not capital by the law of this country, where the arrest was made, so that the parallel is close to the present case, where martial law, a law no doubt different in its penalties, was in force in the district where the offender was taken. But the general rule is that the *lex loci* governs the quality of the criminal act alleged.

prisoner had either caused seditious papers to be published in the proclaimed district, or had incited to an insurrection there, or was privy to any conspiracy, rebellious or treasonable, for causing a rebellion or levying war there, he was guilty there, and could only be prosecuted and tried there, and therefore, if arrested at all, must necessarily be conveyed and imprisoned there.

And, assuming Gordon to have been party to a conspiracy (*a*), for any unlawful object, even if only to raise a rebellion, or even a mere seditious assembly, whether or not he was privy to the particular insurrection or the particular outrages committed; then he would be liable to be tried in any district in which it could be proved that any act was done by any one of the conspirators, by himself or any of the others, in furtherance of the common design.

That for the offence of seditious publication of papers (*b*), the prisoner was liable to be tried where the publication was caused, and that every publication caused by him was a distinct offence, are propositions of criminal law familiar to every lawyer. And that, assuming he had been guilty of conspiring to incite a rebellion (*c*), or seditious assembly, he would be liable to be tried in the district where the rebellious rising, or the seditious assembly, was

(*a*) In indictments for conspiracies, the *venue* may be laid in any county in which it can be proved that an act was done by any one of the conspirators in furtherance of the common design (Re Brisac, 4 East, 164, Ross's Crim. Ev. 27). So in indictments for treason, the *venue* may be laid in any county in which a sufficient overt act can be proved (*Ibid* Re Lord Preston, 4 St. Trials, 410). So in an indictment for sending seditious paper libels, the *venue* may be laid in the county where they are received or circulated. *Ibid.*

(*b*) (*Vide* Russell on Crimes, vol. i., Book ii. c. 24. *Ibid.*) There the case is cited of a person in Ireland, causing a publication in London, by sending papers there to be printed, and it was held that he could be tried in London, since he had sent the papers to London to be published there (*R.* v. *Johnson*, 7 East, 65). So it was held in the case of Sir Francis Burdett, that he could be indicted in the county where he had sent the seditious paper to be published. (*The King* v. *Burdett*, 4 B. & Ald.)

(*c*) As in the case of Hunt, in B. & Ald. 501, *Vide ante*, 37, 39.

to take place, or where the attempts or incitements were made, is equally clear.

Whether or not the Governor could order the arrest of the person in question, would depend upon whether, on the facts within his knowledge (*a*), or information, he really believed the person to have caused or incited the rebellion, or to have been in complicity with those who had incited to it; whether or not he had advised or intended the *particular* insurrection, or the particular outrages which had arisen out of it.

Nor would it be at all necessary that there should be positive or express proof of any conspiracy (*b*), for that might be inferred from circumstances, nor that there should be express proof of an actual intent to incite to rebellion, if the means used were such as were calculated (*c*) to incite

(*a*) There was the seditious proclamation on the state of the island; there was the address in which he had told the blacks "to do as they did at Hayti." There had been also various other similar meetings, held by this man, with the aid of Bogle, M'Laren, and the other ringleaders in the rebellion, whose names were to the manifesto issued at the outbreak of the insurrection (*vide ante*, p. 117). There was a deposition (*vide ante*, p. 176).

(*b*) *Vide ante*, p. 35.

(*c*) The general rule of law is, that a person must be taken to have intended to do that which his act is calculated to effect. The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary, and it is for him to show the contrary." (Abbott, C. J., *R.* v. *Harvey*, 2 Barnwall and Cresswell's Rep. 258.) "If I utter defamatory language of a particular person, the presumption is that I mean to do him a mischief. (Bayley, J. *ibid* 263.) And so as to a charge of a publication not only libellous and injurious to the individual to whom it relates, but mischievous to the public, as calculated to excite great alarm in the minds of the people. (Holroyd, J., *ibid* 265.) If a thing is in itself mischievous to the public, and is wrongfully done, that is an indictable offence. (*Ibid.*) "When a publication, having an injurious tendency is proved, it is intended to have been done with a malicious intention, because the principle of law is, that a party must be always taken to intend those things, and those effects, which naturally grow out of the act done. (*Ibid.*, p. 266.) And if a publication is calculated to produce irritation and disorder throughout the country, the publishers must be taken to have intended to produce those consequences which it was legally calculated to produce." (Best, J. *Ibid.*, 268.)

to it. Nor would it be necessary that the Governor should have sufficient proof to convict, for that would be for the Court to consider; it would be enough for the arrest that there was some suspicion of such complicity in the rebellion as to make the prisoner liable for it.

The question, as to the legality or even propriety of the arrest and removal, would be, even at common law, and in ordinary times, whether a magistrate, upon a formal deposition of these facts, or some of them, might not honestly have issued a warrant for the arrest and removal to the district, for the purpose of further examination or trial, on a charge either of being accessory to murder there, or of inciting to rebellion there. And the omission to take formal depositions (*a*) would, even at common law, if there were an honest belief in the facts, be a mere irregularity, which might affect the legality of the arrest, but could not possibly affect the legality of the trial, and not necessarily the propriety of the arrest, if the facts, so far as material for arrest, were notorious.

All, therefore, that the Governor had to consider, in ordering the arrest and removal of the prisoner to the proclaimed district, or that would have to be considered, in judging of his act, would be, whether he could honestly suppose it probable (*b*) that the prisoner had committed

(*a*) A Secretary of State, or Governor, may arrest on charges of sedition (*Entick* v. *Carrington*, 2 Wils. Rep. 278), and though, if a magistrate act *without information*, and maliciously, an action would be at common law (*Morgan* v. *Hughes*, 2 T. R.), it would only be for the arrest and false imprisonment, and could have no possible bearing upon a subsequent trial of the party arrested, which would depend on the locality of the crime, not the legality of the arrest. (Heath, J., *Mure* v. *Kay*, 4 Taunt. Rep. 35.) And as to information, there can be no doubt that all Kingston was clamorous for the arrest, *vide post.* And there was a deposition (*vide* p. 176).

(*b*) That he might honestly enough suppose so, and could scarcely help so supposing, will be manifest from the statement of a few of the notorious facts, that Gordon had been for months engaged in a system of seditious agitation in the district at meetings held by tickets; that in those meetings he had been associated with the active leaders of the insurrection; that at the time of his arrest, a week after the insurrection, they were most of them still at large, and actively engaged in trying to keep up the revolt;

any offence in that district; as he well might have done, either by sending or causing incitements there to the people to revolt, or by conspiring with others to do so, although never personally there. For if so, then the prisoner, as he was triable there (whether at common law or by martial law), was removable there, and this would justify the arrest.

The only question would be whether the Governor was justified in issuing his warrant for the arrest and removal of the prisoner upon a *primâ facie* case of suspicion of complicity in a crime committed in the district to which he was removed. That act, the arrest, was all he was legally responsible for in the case; for if the man were once arrested, he could only be sent for trial to the district where, if at all, his crime had been committed. And if he were guilty of complicity in an armed insurrection there, or a conspiracy to incite to it, it was there, and there only, that he could be tried; and it was *there* he must be sent for trial (*a*).

The question, whether the man had committed an offence within the cognizance of martial law, would be for the

that, up to the time of his arrest, he had never denounced the rebellion, nor used his influence to surpress it; that the massacre was perpetrated in the presence of the direction of these men, and upon his own political opponents; that, when he was arrested, his portmanteau was found filled with these meeting tickets; and that similar tickets were found, with arms and plunder, in the houses of the rebels; that he had never spoken of the massacre as criminal, but rather with exultation; that some of the rebels, when brought to execution, ascribed their fall to him; and that he was everywhere and universally believed to have originated the rebellion. And there was a deposition. (*Vide ante*, p. 176.)

(*a*) (*Vide ante*, p. 175.) As to the offence of sedition being committed where the seditious papers are circulated with the concurrence of the party accused, and as to the offence of conspiracy to incite rebellion being committed where the overt acts are committed, *i.e.* where the rising is to take place, see "Russell on Crimes." The publication of the proclamation, which, to say the least, might honestly be deemed seditious, was a notorious fact, of which it would have been idle, under such circumstances, to wait for a formal deposition, and the circulation of it had been notoriously kept up in the district. But there was a deposition. (*Vide ante*, p. 176.)

military Commander, and, assuming as the Governor would have a right to assume, after the proceedings had been initiated and confirmed by the military Commander, that the trial was lawful, and the finding of the court was justified by the evidence, it of course would be idle to discuss the legality of the arrest (*a*). And as to its propriety, that would depend upon the judgment formed as to its necessity or expediency, with a view to the suppression of the rebellion, that is, a judgment formed at the time and upon all the circumstances.

Supposing the Governor were responsible, not only for the arrest and removal of the prisoner into the proclaimed district, but also for his being put upon his trial there (*b*), the question, whether it was proper to put him on his trial there (assuming that a court-martial would have jurisdiction, which it would be for the military Commander to judge), would be one of military expediency, depending

(*a*) If the prisoner could not be tried there by martial law, he could not be tried, then, at all; for he could not be tried elsewhere for the offences with which he was charged, and could not be tried there, except under martial law, for other law was in abeyance. So that the question of propriety or necessity turned upon whether it was desirable that the man believed to be the real author of the rebellion, should be tried then at all, or delayed till the danger was over; the rebellion being still in force, and the active leaders at large. He could not be tried anywhere else than where *the alleged offence was committed.* And if he committed the offence of sedition or insurrection, beyond all doubt it was in the district to which he was sent. Whether he should there be tried under martial law, would depend upon whether he should be tried at all, that is, then.

(*b*) Governor Eyre's despatch, 22nd October. He stated the circumstances briefly thus, "On the morning of the 20th October, having put on shore the prisoners, including G. W. Gordon, I again proceeded to Kingston. At Kingston all was quiet, though apprehensions of an outbreak is still entertained, and all practicable precautions against it taken. Many political characters, suspected of being implicated in the rebellion, have, under the authority of the Executive Committee and the civil authorities, been apprehended. So also have various Haytien refugees, suspected of being mixed up with the leaders of the insurrection. In the country districts rumours of disaffection exist, and threatening letters are received, but no outbreak has occurred." Gordon had been arrested on the 18th. The ringleaders were still at large (*vide ante*).

upon the circumstances of the time, and whether a speedy and exemplary punishment of the prisoner was necessary.

In this point of view, it was important to consider (*a*), that though actual insurrection had been checked, the negro population was believed to be in a state of rebellion; that the active leaders were still at large and as determined as ever; that the prisoner had been closely associated with them, had never said a word to denounce or discourage it, and that he was believed to be the real head and origin of the rebellion.

The Governor, however, was responsible only for the arrest and removal. The act of putting the prisoner upon his trial was the act of the military Commander. He, again, could only be responsible for putting the prisoner upon his trial, and would only be responsible for that, if the trial were wholly illegal, through entire want of jurisdiction, whether by reason of the court not being duly constituted, or the prisoner, or the charge, not within their cognizance. Both were questions for him, as the military Commander, to determine, and the latter was distinctly raised (*b*) on behalf of the prisoner, before he was put on his trial.

(*a*) It is notorious that no rebellion is ever thoroughly suppressed, until the ringleaders are caught and punished, and above all the real ringleaders, the man who was its *head* for it is probably in him, more than in any one else, that the rebels, especially if ignorant and credulous, rely, and it is not until he is executed that they finally lose all hope of success. As a matter of fact, in this case, the man believed to be the real head, Gordon, was executed on the 23rd October, the active ringleaders on the 24th October, and up to that time there were acts of armed rebellion, and of actual outrage, which not until then began to abate. The troops were not reinforced until the end of the month, the 29th, and the very next day an amnesty were declared, which, however, could of course be only retrospective, and there was still a state of alarm and apprehension, so that it was not until the 14th Nov. deemed safe to put a stop to martial law.

(*b*) An attorney, on behalf of Gordon, wrote him a letter, which he handed to the General, desiring him to let it be given to the prisoner, and in which he suggested, that whatever his offences might have been, they were committed before the proclamation of martial law. "I advise you to plead :—1. That, on that account you are amenable only to the ordinary civil and criminal courts of the country; and, as a further plea, 2. That

With reference to the question whether the prisoner could lawfully be *tried* under martial law, the question would be, not whether, under martial law, a prisoner can be tried for an offence committed in connection with the rebellion, and in the proclaimed district, though before the declaration of martial law (*a*); but whether a person who has incited to, caused, or joined in, the rebellion, can be tried under martial law, a question which almost seems to answer itself in the affirmative, for, in such a case, the offence was the raising the *state* of war which martial law only *declares*, and to which it applies; and, further, the offence is *continued* by the existence of the rebellion, so that it is as much committed after as before the *declaration* of martial law, and so in either view is committed *under* martial law (*b*).

that only is crime which is prompted by a criminal intention, and that you, having had no such intention, are not criminally liable for the consequences, however disastrous these unhappily may have been." The Brigadier-General declined to deliver this to the prisoner, and as to the first point, it being one which went to the jurisdiction of the court, it was for him to determine, and it was conceived he determined it rightly by overruling it. As to the other point, it was a point to be considered by him in framing the charge, as to which it was, it is conceived, a false point, bad in law, for in sedition, an actual criminal intent, even at common law, is not material (*vide ante*), and under martial law the criminal intent is less material than at common law, because the scope of martial law is not so much guilt as mischief, and the actual cause of it, and men must be taken to have meant what they have done. And if the prisoner had published seditious papers or entered into a rebellious conspiracy, it did not matter what his intent was, and whether it was to commit the massacre or not.

(*a*) That question has already been discussed (*vide ante*, p. 104), whether or not, under martial law, a person may be tried for an offence committed before martial law was declared, which, it has been argued, depends upon what is the real scope of martial law, and whether it is not the prevention of a danger, and the suppression of a rebellion. But this assumes that the offence has been committed and completed before martial law, and still leaves open the question whether the offence has been so completed. Now it is of the nature of some crimes, especially such as savour of conspiracy, that they may be committed in places at a distance from the person who is in law liable for them, and of course, therefore, after the time when any personal acts of his own may have been committed.

(*b*) That the state of war, as against the aggressor, begins from the

It is to be borne in mind (*a*) that by martial law, in time of war or rebellion, all persons are liable to be called as soldiers, and that by martial law, in time of war or rebellion, as is by statute; whether as to soldiers or other persons in time of peace, the offence of inciting to mutiny or rebellion is capital, and that it is committed where the incitements take effect, so that it would require a statute to authorize its trial elsewhere.

Assuming, then, either that, under martial law, seditious publications or rebellious incitements or conspiracies, which have led to the existing rebellion, are cognizable under martial law, declared for its suppression (*b*), or that, by reason

aggression, not from the proclamation. (*Vide ante*, p. 17.) And that is especially true of rebellion, which is war by the subject against the sovereign, and is traitorous. (*Vide ante*, p. 18.)

(*a*) Simmons on Court-Martial. The law on the subject, on its civil side, is contained in Russell on Crimes, vol. 1, c. 7, "Of seducing soldiers to mutiny." Every Mutiny Act since the Revolution has enacted that, as it is requisite that *soldiers* who shall mutiny, or stir up sedition, be liable to more exemplary and speedy punishment than the usual form of the law will allow; that, therefore, if any soldier shall, during the continuance of the act (*i.e.*, in time of peace or war), commit any of these offences, he shall suffer death, or such other punishment as shall be awarded by a court-martial. And statutes 37 Geo. III. c. 70, and 57 Geo. III. c. 7, enact, that any person who shall maliciously and advisedly endeavour to seduce any person serving in his Majesty's forces from his duty and allegiance, or to incite or stir up such person to commit any act of mutiny, or to make, or endeavour to make any mutinous assembly, or commit any traitorous or mutinous practice whatever, *i.e.*, in peace or war, he shall, on being legally convicted, suffer death. That in time of mutiny soldiers are *ipso facto* subject to martial law (*vide ante*, p. 74, *Wall* v. *Macnamara*). And that the effect of martial law in time of rebellion is to render all persons subject to those severe penalties which, in time of peace, by the Mutiny Act, soldiers are subject to; and, by other statutes, all persons, is manifest from the very nature and definition of martial law, as already shown, which means, in fact, nothing more nor less than the extension of military law to civilians. Gordon, therefore, was liable to the capital penalty, if he had endeavoured to incite to rebellion in the declared district.

(*b*) Which would depend upon the object of martial law, and whether it is not the suppression of the rebellion; and also on whether its operation does not depend rather upon the existence of the state of war or rebellion, than upon its formal declaration or proclamation, as to which, *vide ante*, p. 17. It is to be observed that the original outbreak, on the occasion of

of a rebellious or treasonable conspiracy, the prisoner was liable for the acts of others *within* the proclaimed district, and under martial law, he could clearly be tried, and could *only* be tried there, and the question of his complicity in such a conspiracy would be the great question to be tried. If he was a party to it, then he was clearly liable, and no question as to jurisdiction could arise.

As to the question whether there was sufficient evidence on which to put the prisoner on his trial, there need be no express proof of complicity, but such evidence as would satisfy the court martial (*a*) of complicity in such a conspiracy.

Moreover, there might be a charge of conspiring with others to incite a mere riot, or unlawful or seditious assembly, as well as for a conspiracy to incite to an insurrection or rebellion (*b*), of which express proof would not

the armed attack on the magistrates, and the massacre that ensued, followed up by the attempt to continue a system of massacre and plunder, was the real commencement and declaration of war, or rebellion on the part of the rebels, against the Crown, and as against them, it was then the state of rebellion began; and so as against any one, a party to any design to produce it; and, after all, the declaration of martial law only declared what already existed. So that it is a fallacy to say that the seditious acts were before martial law.

(*a*) The evidence to satisfy them of this, let it be observed, need not be express evidence of an actual conspiracy. There need be no direct evidence that the prisoner and the others ever met. In the latest cases on the subject, the juries were told that it does not happen once in a thousand times, when the offence of conspiracy is tried, that anybody comes forward to say that he was present when the parties met and conspired together. It is to be *inferred from the conduct of the parties;* and, if several men are found to be taking steps towards an obvious purpose, and which tend to one end, it is for the jury to say whether they have not combined and conspired to carry out that purpose, which their acts and conduct appear so obviously designed to effect. (Russell on Crimes, last edition book 5, c. 2.)

(*b*) This was held in Hunt's case already cited. There also (*vide ante*), it was held, that resolutions passed at a former meeting shortly before, though in a distant place, but at which he also presided, and the avowed object of which was the same as that for which he was indicted, were admissible against him; and further, that the character and demeanour of bodies of men coming to the meeting, over which he presided, was ad-

be necessary, even at common law; but it might be implied from various acts and circumstances, and that offence, which at common law is a mere misdemeanour, is by martial law capital; and if it once existed, and still continued, then his privity (*a*) to such a conspiracy, before the declaration of martial law, would render him liable, either under common law or martial law, for complicity in the then existing rebellion, the result of such incitements.

It is to be observed that a conspiracy for any unlawful object, even a riotous, seditious assembly, is, even at common law, an offence, and, by martial law, is capital (*b*); further, that no direct evidence of concert or (*c*) conspiracy would be necessary; but it might be inferred, even on a trial at common law, from the fact, that all the parties were in communication, and had taken such means and measures as were likely to conduce to the supposed design.

missible against him, without express proof that he had organized and arranged them, or directed their organization. *Ibid.*

(*a*) Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act of the whole party, and therefore the proof of such act would be evidence against any of the others, who were engaged in the same conspiracy (1 Phil. on Ev., Russell on Crimes, vol. ii. B. 5, c. 2). And though, in general, proof of concert or connection must be given before evidence is admissible, of the acts or declarations of any person not in the presence of the prisoner, it is for the court to judge whether such connection had been sufficiently established; and when that has been done, the doctrine applies, that each party is an agent for the others, and that an act done by one, in furtherance of the unlawful design, is, in law, the act of all. *Ibid.* And it is not necessary to prove any direct concert or even any meeting of the conspirators, for the actual fact of conspiracy may be collected from the collateral circumstances of the case (*R.* v. *Murphy*, 8 C. & P. 297; Coleridge, J., *R.* v. *Shelland*, 9 C. & P. 277; Russell on Crimes, vol. ii. B. 5, c. 2).

(*b*) Russell on Crimes, B. 5, c. 2.

(*c*) The evidence in support of an indictment for conspiracy is generally circumstantial, and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. Although the common design is the root of the charge, yet it is not necessary to prove that

The question, whether there was evidence on which any charge could be framed, which would be cognizable under martial law, was deemed to be one purely military, and resting with the military Commanders to determine. The General in command (*a*) considered the evidence, with a view to determine it, and convened the court, and controlled the proceedings.

So, it was the military Commander who framed the charges (*b*), on which the prisoner was tried, the two-fold

the defendants came together, and actually agreed in terms to have the common design, and to procure it by common means, and would carry it in execution, because in many cases of the most clearly established conspiracies, there are no means of proving it. If, therefore, two persons prove by their acts the same object, often by the same means, one performing one part, and the other another, so, with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusions that they have been engaged in a conspiracy to effect that object. (Per Coleridge, J., *R.* v. *Murphy*, 8 C. & P. 297.) Nor need all the parties be parties to a knowledge of all the acts or means adopted. And there may be a conspiracy to publish a seditious libel (*Ibid*), or to get up a seditious assembly, or for any object that is unlawful. *Ibid.* And the acts of the different parties may prove the conspiracy (*R.* v. *Frost*, 9 C. & P. 129). And the conspiracy will be treasonable where it was entered into or carried out.

(*a*) His official despatch was as follows : dated "Morant Bay, 21st Oct. 1865, 8 p.m. Sir,—After six hours' search into the documents connected with the case of G. W. Gordon, I found that I had sufficient evidence to warrant my directing his trial. I prepared a draft charge and *precis* of evidence for the Court. It assembled about 2 p.m. this day, and closed its proceedings after daylight. The President having transmitted them, I carefully perused them. The sentence was Death. I considered it my duty fully to approve and confirm. I enclosed the whole of the proceedings of the Court for your information, as you may desire to see what evidence led to the conviction of so great a traitor. I have not furnished any report of the Court to his Excellency the Governor, because, as his Excellency is now at Kingston, I apprehend all my report should be made through you, my immediate commanding officer. I have no copies of any documents herewith transmitted, and therefore hope hereafter to be allowed to take them. Hoping, as heretofore, to gain your approval. (Signed) A. A. Nelson, Brigadier-General, Commanding the Field Forces. To Major-General O'Connor, C. B."

(*b*) Which of course would be framed to meet what the General deemed to be the effect of the evidence to be adduced, and which *he* had considered, and had been desired by the Governor to consider, with a view to determine

charge of treason and sedition, and the charge of complicity with the rebels, or, in other words, conspiring with them to incite the blacks to rebellion. The first was, in substance, a charge of actually engaging in or raising the rebellion, —the other charge of conspiring with the ringleaders, both charges equally capital, under martial law.

The charges (*a*) against the prisoner, therefore, were, in substance, rebellion, and conspiracy to incite to rebellion, that is, rebellion generally, not necessarily the particular insurrection. Nor would it necessarily involve an actual intent to raise such an insurrection as had burst forth.

So far, as to the act of the General in putting the prisoner upon his trial at all on these charges. Next, as to the constitution of the court-martial, which was equally the

whether it was sufficient, *i. e.*, to sustain any charge cognizable by a court-martial under martial law. And the General's attention had been specifically called to the points raised on behalf of the prisoner (*vide ante*), that his acts were prior to martial law, and that he had not intended to produce the *particular* results which had ensued, that is, the massacre. None of the charges point to *that* as the charge. The first, treason and sedition, or treasonable sedition, meant, no doubt, a raising of rebellion, which would be levying war, though probably being out of the realm, not strictly an act of *treason*. The other charge was complicity, not in the massacre, but *with the ringleaders*, who personally directed it, that is, *conspiring* with them to raise rebellion. There would be considerable difficulty, perhaps, in sustaining a charge of treason, for, at common law, conspiring to depose or dethrone the Sovereign would be treason, because tending to his death. The merely *levying war*, unless directed to that object, is only an act of treason when within the realm, and, of course, no levying war, in such a remote dependency, could be deemed to have any such object; and as to statutable treasons, at least, so far as regards Imperial statutes, they all apply only to acts within the realm, especially the latest (57 Geo. III. c. 6, note 3, Hallam's Const. Hist. p. 154). But although the levying war against the Crown might not be treason, it would not the less be *war*, which would justify martial law, and be a capital crime (*vide ante*, p. 2).

(*a*) It must be borne in mind that, by martial law, either or any of the offences charged would be *capital*, for sedition, though only a misdemeanor at common law, is one of the most formidable of offences of which martial law takes cognizance, and is capital. So of insurrection, whether or not combined with actual murder, and whether or not the offendor is guilty of designing the actual murders committed.

act of the supreme military authority (*a*). It is to be observed, that it was not necessary that the strict rules of ordinary military law should be adhered to (*b*), which require a general court-martial in a case of life and death, and it might be what it was, a drumhead court-martial.

It is important to bear in mind (*c*), in considering the trial, that it took place before a court-martial, composed of officers, who had themselves been engaged for a week in putting down the rebellion, and who, therefore, had personal knowledge of it, so that it would have been idle to require formal proof of it. And they also knew that the *active* ringleaders were political associates of the prisoner, who did not deny it, and could not, in the face of express proof of it, as well as of universal knowledge of it.

As it would be idle to suppose that they could discard from their mind the general knowledge they possessed of

(*a*) All this was entirely a matter of military usage, to be determined by military authorities, and the Governor had, and could have, nothing to do with it.

(*b*) It has been somewhere said by lawyers, that drumhead courts-martial cannot take cognizance of cases of life and death, but this has never been laid down by any military authority, and is contrary to notorious military usage in time of war and rebellion, when sufficient officers cannot be obtained to constitute a general court-martial. Ordinarily, no doubt, there must be a general court-martial in a case of life and death, but that is according to regular military law in time of peace, and has nothing to do with martial law. This distinction, which underlies the whole question, was lost sight of in the Ceylon case, and evidently formed the main ground, or one of the main grounds, on which the legality of the capital executions that took place under martial law, by sentence of court-martial, was erroneously impugned. (*Vide ante*, p. 106.) It was found to be a mistake.

(*c*) It is to be observed that the members of a court-martial are in the position of jurors, as well as of judges; that is, they are judges of the matters of fact, and of the effect and weight of evidence, and that they have no knowledge of the rules of legal evidence, and of course are not called upon, and cannot possibly be expected, to observe them. Indeed, these rules, even if they bound courts-martial or military courts at all, only do so, so far as they are conducive to substantial justice (see the author's notes to the case of *Dickson* v. *Wilton*, 3 Fost. & Fin. rep. 682), and courts-martial in time of war, or under martial law, are only bound by the rules of natural justice. (*Vide ante*, p. 67, *in notis.*)

public, undoubted, and notorious facts, it would not be contrary to, but consistent with, natural sense and justice, that they should use that knowledge of such general public facts to illustrate, and give force and meaning to, the express evidence in the case, which otherwise might seem to have no significance (*a*). And among these facts, surely, was the existence of the rebellion, the perpetration of the massacre, the presence of certain persons at it as leaders, and the notorious fact that these men were still at large, and had been engaged in a system of meetings throughout the island; as to the general character of which meetings, and the prisoner's connection therewith, express proof was given.

(*a*) Originally, the juries judged entirely of their own personal knowledge, and hence always came from the neighbourhood, *de vicinoto*, and though for ages it has been the practice to require express evidence of particular facts, it is by no means quite certain how far they may not draw on their own knowledge of facts, public and notorious, as a war or rebellion, and the like, or how far the court may take judicial notice of such public facts. In *The King* v. *Sutton*, 4 M. & S. rep. 536, a case of indictment for sedition, the royal proclamation was put in evidence, to show that a system of outrage had existed, which, it was suggested, the libel tended to incite to, and it was admitted as an act of the State, founded on the existence of the outrages it recited; and preambles to Acts of Parliament, also reciting them, were admitted as *tending to show the notoriety* of their existence. In the course of the summing up, the Judge alluded to the personal knowledge of the jury, as illustrating this evidence; and this was held not improper, because it formed "a part of the history of the country that such outrages had been committed;" and "it was as if he had said, every one must be aware of what has passed before their own eyes, and at their own doors; and though it was added that he did not advise them to rely on it as a source of information, on which they were to found their verdict, that was said, be it observed, of a trial at strict law, and merely shows that the practice at law has altered in that respect. But the fact that, in ancient times, juries might judge of their own knowledge, shows that it cannot be contrary to sense or justice that they should do so; and, on the other hand, it would be contrary to sense, that a court, which is both judge and jury, and is trying a case summarily, should stand out for formal proof of notorious and public facts. The courts of law may take cognizance of acts of State, and public and notorious facts, such as a war. (*The King* v. *De Beranger*, 3 M. & S. rep. 69.) And in *Wright* v. *Fitzgerald*, 28 State T., there does not appear to have been any proof of martial law, which, however, was noticed.

In considering the evidence (*a*) upon these charges, it is necessary to look, first, at the facts notorious, and in the knowledge of all in the island, of which it would have been idle, before a court-martial, under martial law, to call for express evidence or formal proof; and at the position and influence of the prisoner, and his immense influence over the black population among whom the rebellion had broken out, and the fact, that for more than a week after the rebellion, and for nearly a week after the declaration of the state of rebellion, he had remained aloof from the Government, and had not come forward, to denounce the rebellion, or to assist in its suppression.

In considering the evidence, or rather the finding of the court-martial thereon, it is to be kept carefully in mind that, once assume the lawful authority of the court, the only question to be considered is, whether there was any evidence (*b*) that could lead them, in fact, whether rightly or wrongly, to the belief of the prisoner's guilt, on either

(*a*) Even at common law, a jury may take into consideration matters of general knowledge; and though strictly legal proof may be often necessary of known notorious facts, it would be too much to expect that a court-martial, sitting under martial law in a state of rebellion, would require formal proof of the rebellion, or the declaration of martial law; or of facts known and notorious over the whole island. The position and influence of the prisoner, known to possess unbounded influence over the black population, was so notorious, that it would have been as ridiculous to attempt to exclude it from the minds of the members of the court, as it would have been to exclude the fact that he himself was a man of colour. And to his not having come forward to assist in suppressing the rebellion, it was one of those negative facts which it would hardly require direct proof, especially since it was obvious that the very arrest and trial of the man was itself the best possible proof of it, for the Government would hardly have arrested a man actively assisting it. It would be borne in mind, that the court-martial, especially sitting under martial law, is not bound by any formal rules, and is only what Bentham calls a court of natural procedure, bound only by the rules of common sense and natural justice; and common sense does not require formal proof of facts universally known, while natural justice only requires that means which in common sense are sufficient shall be used to find out the truth.

(*b*) The evidence was his seditious proclamation in the district; his seditious address, in which he told the blacks to do as they had done in

of the charges against them ; not whether, in the opinion of others—least of all, lawyers—that evidence was sufficient.

And assuming that the court-martial had lawful authority (*a*), which they surely had—unless no court-martial can have any authority to try prisoners under martial law—it was for *them*, if there was *any* evidence upon the charges

Hayti, *i. e.* to massacre the whites; evidence (strict legal evidence) that he had said, some time before, to the active leader of the rebellion, that if the blacks did not get the back land, the whites must die; evidence (*not* strictly legal) that he had used similar words on another occasion, and that he had written a letter to one of the ringleaders, to the effect that the negroes must be prepared for war, and get the lands; evidence that he was connected, in a system of seditious agitation, by means of meetings, with the most active leaders of the rebellion; and that, at the time of his apprehension, his portmanteau was filled with tickets of the kind which it was well known had been used in getting up these meetings; and such as had been found in the houses of some of the rebels, along with arms and traces of pillage;—proof that he was in constant correspondence on political matters with the actual leaders who had been,—as was notorious, —drilling and arming; evidence, that those who were thus engaged at the real seat of the rebellion (Stoney Gut) were "his friends, and taught by him;" proof, that he had said that his people would be revenged on the chief victims of the massacre; and the notorious fact that they had been murdered under the personal directions of his associates. That some of this evidence would not have been admissible on a regular legal trial, is, for reasons already given (*vide ante*, p. 67), quite beside the question, the court not being bound by the strictl egal rules of evidence. Whether all of it would have satisfied a judge and jury on a charge of designing the actual massacre, on the particular occasion, is quite immaterial; or whether it would have satisfied them on a general charge of conspiring with others to incite to rebellion. All that is material is, whether the members of the court-martial might well enough be so satisfied; and this the prisoner himself virtually admitted when he said that the circumstances were very much against him. Proof by circumstances, only consists of *more or less* of probability; common law requires that it shall be the strongest degree; martial law does not, but only such a degree as shall, in *fact*, satisfy honourable men.

(*a*) That is, assuming the declaration of martial law was lawful, as to which (*vide ante*, p. 56), and that the Commander had authority to hold courts-martial; though, indeed, it should seem that, under martial law, it is not necessary that there should be any express authority by military commission to hold courts-martial; for such express authority applies to regular courts-martial held under ordinary military law; whereas, as

made, to consider the *weight* of that evidence (*a*); and as this is necessarily a matter of opinion, the mere fact that others might differ from them as to its weight, could not render their sentence unlawful.

The very object and end of declaring martial law is, to have the summary procedure by military law; what a great jurist calls a natural procedure, as opposed to that which prevails at common law (*b*), which is formal, and often obstructive of justice, because conceived in the interest of the *accused*, rather than of justice: and if, after martial law has been lawfully declared and acted on, the cases are to be retried as at common law (*c*), the effect would be such monstrous injustice, that on future occasions, no one would venture to declare martial law, or try prisoners by court-martial, and the consequence would be to deprive martial law of the deterrent effect of speedy and terrible punishment.

already shewn, martial law is not governed by the same regular rules or authorities as ordinary military law (*vide ante*, pp. 67, 69).

(*a*) This is a general principle, recognised even in the courts of common law, as to tribunals, bound by the strictest rules of law and evidence, and of course it applies *a mullo fortiori*, to such irregular tribunals as courts-martial under martial law, which, it cannot be too often repeated, are not bound by these rules, and are only bound by that great principle of natural justice which requires that such proof shall be given as, in *fact*, may lead to a persuasion of the guilt of the accused.

(*b*) This idea has been already referred to at some length, in a previous part of the work. (*Vide ante*, p. 69.)

(*c*) It is not necessary to discuss whether there was evidence upon which Gordon might have been convicted at common law, on either of the three charges made, still less whether a jury would have convicted, which might have depended upon how far they were impartial, or were politically in sympathy with him. But if there would not have been legal evidence sufficient for a conviction at common law, and if, in common sense, there could be no real doubt that he was guilty of sedition, which, in fact, caused the insurrection; and strong reason to believe that he was privy to a plan for an armed insurrection, and that the rebellion could not be thoroughly suppressed unless he was punished; then there would only be the greater reason for dealing with him under martial law—that is just the sort of case to meet which martial law is designed, for otherwise a whole colony may be continued in a sanguinary civil war, merely for want of strict, formal, legal proof against a party known to be the real head of the rebellion. But, as

It would be enough, however, on any of the charges, that there was any evidence which would warrant the findings against the prisoner on those charges. And, according to the principles already laid down, it is believed upon ample authority (*a*), it would not be for a military Commander, who set the law martial in motion by sending the prisoner for trial before court-martial, or for the members of the court-martial, or for the military Commander, who approved their finding, to show that there was sufficient evidence, in the opinion of others, to warrant a verdict; but it would be for any who impeached their proceedings, to show that there was no evidence; that is, it would not be for them to show that he was guilty, but for others to show that he was not, and that they knew it, or might have known it or seen it, if they had not been culpably reckless, or in a conspiracy to destroy him, with or without evidence (*b*).

It is hardly necessary to say (c) that the members of the

already shown, there was sufficient *strict* legal proof of complicity in a design for an armed rebellion, which would have warranted a verdict against him on a trial at common law, whether or not it would have secured such a verdict.

(*a*) *Vide ante*; p. 190.

(*b*) It is scarcely worth while to discuss this supposition, which is simply too monstrous to be entertained for a moment by any man of sense. How could they, in the face of positive evidence that the prisoner had recommended the blacks to imitate the bloody example of Hayti, and to kill the whites in order to get the land—confirmed by admitted and undoubted facts, be said to have had no evidence? The prisoner himself admitted that the circumstances were strongly against him. And this no one can fail to see.

(*c*) Thus to the court of a coroner, of which the coroner is the judge, it was said, and it is a very general rule, of very great antiquity, that no action will lie against a judge of record, for any matter done by him in the exercise of his judicial functions. (*Floyd* v. *Baker*, 12 Lord Coke, 240; *Grenvelt* v. *Burnett*, 1 Lord Raymond's rep. 454.) The same principle was virtually laid down as to courts-martial, when it was held that the courts of Westminster Hall exercise a controlling jurisdiction over them, "to keep them within the bounds of their jurisdiction." (*Grant* v. *Gould*, 2 H. Blackst. rep. 68.) Lord Tenterden, C. J., *Garnett* v. *Ferrand*, 6 B. & C. 626. And there is a similar rule as regards even Justices of the Peace, who, although liable if they act illegally *out* of their jurisdiction, are not liable

court-martial, assuming lawful authority to take cognizance of the case at all, could not be legally liable for any error of judgment in convicting upon insufficient evidence, or rather on evidence deemed by others insufficient, for it is a general principle that men are not liable for lawful judicial acts.

The Commander-in-Chief having received the report of the proceeding, sent it to the Governor (*a*), without

within their jurisdiction, unless they act maliciously or corruptly, and then they are liable by criminal information. "This freedom from action and question at the suit of an individual, is given by the law to the judges, not so much for their own sake, as for the sake of the public, and for the advancement of justice, that, being free from actions, they may be free in thought, and independent in judgment, as all who are to administer justice ought to be. And it is not to be supposed beforehand, that those who are selected for the administration of justice, will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for any error in judgment, so long as they act within the bounds of their jurisdiction. Corruption is quite another matter, so also are neglect of duty and misconduct. For these I hope there is, and always will be, some due course of punishment by public prosecution." (Lord Tenterden, C. J., *ibid*, 626.) "It is not to be expected that any person will act, at the peril of being harassed by a multiplicity of actions, and of having his reasons and motives weighed and tried by juries, at the suit of individuals who may be dissatisfied with his verdict. *Ibid.*

(*a*) Despatch of Commander-in-Chief:—"Jamaica Command, Head Quarter House, Kingston, 22nd October, 1865.—Sir,—I have the honor to transmit, for the information of your Excellency, copy of a despatch, received at noon this day, from Brigadier-General Nelson, with proceedings of court-martial on G. W. Gordon, and other documents, which, having perused, may I request your Excellency will return to me, with as little delay as possible. I have, &c., L. Smythe O'Connor, Major-General commanding the forces." His Excellency returned the documents, with this letter:—"King's House, October 22, 1865.—Sir,—I have the honor to acknowledge the receipt of your communication dated to-day, transmitting for my information copy of a despatch received at noon this day, from Brigadier-General Nelson, with proceedings of a court-martial on G. W. Gordon, and other documents, which you requested me, after perusal, to return to you with as little delay as possible. I have duly read the papers referred to, and I fully concur in the justice of the sentence, and the policy of carrying it into effect. There can be little doubt, I think, whatever Mr. Gordon's intention may have been, it is entirely due to his agitation, bad advice, and seditious language amongst the peasantry of this colony, that the rebellion broke out, and the massacre of so many gentlemen, and the

any disapproval; and it is conceived that, according to military law, unless the supreme executive authority chose to interpose, in the exercise of the prerogative of mercy, the proceeding would be returned to the General as a matter of course, in order that the sentence should be carried out. And, as the Governor saw no reason to interpose, the sentence was accordingly executed.

It will be observed that the Governor, in approving of the sentence, and leaving it to be carried out on the prisoner according to military law, based his judgment, not upon express proof of his actual intent; but upon his having been a party to acts, the natural tendency of which was to excite to rebellion; so that it was due to his agitation and seditious language that the rebellion broke out; and the necessity for his execution, for the suppression of the danger which still existed, and which he had thus caused. And this, it is conceived, showed a right view of the case (*a*), and of the scope of martial law.

destruction of so much property, ensued. It will be remembered, also, by your Excellency, that Colonel Hobbs, commanding another force in the field, has reported that he had sufficient evidence to justify the execution of Mr. Gordon. This latter evidence, too, is quite unconnected with that adduced before the court-martial, and has not been under consideration at all. I believe that, were condign punishment to fall only on the ignorant people who have been misled into rebellion, and the educated coloured man who led to that rebellion to escape, a very unfortunate impression would be produced upon the public mind, which, in the present state of the colony, might lead to very serious results. It is only by making it plain to the entire population, that the guilty agitator and user of seditious language will meet the same punishment as the uneducated fools whom he misleads, that we can hope to check and put down the spirit of disloyalty and disaffection, already so rife in the land, and which may, at any moment, occasion in other parishes outrages similar to those which have recently occurred in St. Thomas in the East. I received your Excellency's letter at 4·30 p.m., and I return the documents contained in it, without delay, as requested. I have, &c., E. Eyre."

(*a*) That is, according to the principles of our common law, a man must be deemed to mean that which is the natural meaning of his words, and the natural consequence of his acts, and cannot be allowed to pretend that he did *not* intend them; and so as, beyond all doubt, Gordon had used seditious language, calculated to excite the people to insurrection, he was the

It is conceived that the Governor, by his approval of the finding and sentence, or rather by allowing the martial law to have its course (*a*), did not at all increase his responsibility, which was only a responsibility for the arrest of the prisoner. At all events, in allowing the execution, he only exercised a judgment as to the expediency of it (assuming it to be lawful), the grounds of which he stated at the time.

In considering the course taken by the Governor in this matter, it would be material to consider (*b*) the grounds

actual cause of it; and as, under common law, he would be liable for sedition, whether he actually intended it or not, and whether or not he was actually privy to a design for an armed insurrection, of which, however, there was positive and sufficient evidence—the Governor waiving that, points out that, for the offence of sedition alone, by martial law, his life was justly forfeited, because, in fact, he had caused the danger, and only his death would remove it. Whether the publications were calculated to excite to sedition, was entirely for the military Commander, and the court, to consider.

(*a*) P.S., 23rd October.—"Having kept my despatch open, I am enabled to add that Mr. George William Gordon has been tried by court-martial at Morant Bay, and sentenced to be hung. The execution was to take place this morning at eight a.m. I have seen the proceedings of the Court, and concur both in the justice of the sentence, and in the policy of carrying it into effect. It is absolutely necessary, for the future security of Jamaica, that condign punishment should be inflicted upon those through whose seditious acts and language the rebellion has been originated. I enclose copies of the report from the General, and of my letter in reply."

(*b*) "Up to the present time, no reasonable or intelligible cause has been assigned as the origin of this most wicked and widespread rebellion. I cannot myself doubt, that it is in a great degree due to Dr. Underhill's letter, and the meetings held in connection with that letter, where the people were told that they were tyrannised over and ill-treated, were overtaxed, were denied political rights, had no just tribunals, were misrepresented to Her Majesty's Government by the authorities and by the planters; and where, in fact, language of the most exciting and seditious kind was constantly used, and the people told plainly to right themselves, to be up and doing, to put their shoulders to the wheel, to do as the Haytiens had done, and other similar advice. The parties who have more immediately taken part in these nefarious proceedings are, firstly, G. W. Gordon, a member of the Assembly and a Baptist preacher; secondly, several black persons, chiefly of the Baptist persuasion, connected with him; thirdly, various political demagogues and agitators, who, having no

and reasons he assigned at the time, in recounting the measures which had been taken, whether with reference to the existence of the danger, or its causes, or their connection with the prisoner, who had thus been dealt with, as the cause of a widespread rebellion, and the author of a system of seditious agitation, which had led to it.

It would also be material to consider, whether it was before or after this measure that the Governor received intelligence (*a*), of the capture and execution of the active ringleaders in the rebellion, who, up to that time, had been at large, and determined to renew the rebellion, and using their efforts to induce the blacks again to rise. For it is manifest, that their being at large, must have had a material bearing on the question of necessity, or propriety for the execution.

And it would be material to consider, that at that time he declared his belief (*b*), that the island not only had been,

character to lose, make a trade of exciting the ignorant people; fourthly, a few persons of better information and education, who find their interest in acquiring an influence amongst the black people by professing to advise them, whilst in reality they are but exciting and stimulating their evil passions. I particularly call your attention to the fact, that the rebels are not the poor or the starving, but persons who are well off and well-to-do in the world, and better educated than the lower class of negroes generally are—an experience abundantly confirmed from many other quarters."

(*a*) It was not until a day or two after the execution of Gordon, that he heard of this. The intelligence is contained in a despatch from General Nelson, dated:—"Morant Bay, Oct. 24. The great rebel, Paul Bogle, has been captured by the Maroons under command of Col. Fyfe. His trial will forthwith begin. There is not a chance of his escaping the punishment he so well deserves. At five p.m. Moses Bogle, brother of Paul Bogle; George Craddock, secretary to Paul Bogle; and J. M'Laren, occasional secretary; and Brown, called captain-general, a notorious rebel, were hanged. Paul Bogle's son-in-law, and the men who first entered Mr. Lare's house, await execution. Colonel Fyfe reports that he has captured a number of the rebels armed with cutlasses, but no time to give names." It was immediately afterwards announced that Paul Bogle had been executed.

(*b*) "In reporting the occurrences of the outbreak of the rebellion, and the steps taken to put it down, it is my duty to state most unequivocally my opinion that Jamaica has been, and to a certain extent still is, in the greatest jeopardy. Humanly speaking, I believe that the promptitude and vigour of action which has at once grappled with and punished the rebellion, has

but still was in great jeopardy, because although *actual insurrection* had been put down, disaffection and disloyalty existed in nearly all the parishes in the island, and he based the necessity for the measures of martial law mainly on the belief that, from the existence of this disaffection and disposition to rebellion, the insurrection, if not promptly put down, would have become universal. At the same time, he expressed his hope, that before long he might be enabled, at all events, to declare an amnesty.

The object of an amnesty was one quite consistent with the continued maintenance of martial law, for it had, in some degree, already, been virtually anticipated by officers in command of detachments (*a*), in conjunction with

been the saving of Jamaica. The whole colony has been upon a mine, which required but a spark to ignite it. Disaffection and disloyalty still exist in nearly all the parishes of the island, and had there been the least hesitation or delay in dealing with them, in the parishes where they became developed in rebellion, I confidently believe, that the insurrection would have been universal throughout the entire island, and that either the colony would have been lost to the mother country, or an almost interminable war, and an unknown expense, have had to be incurred in suppressing it." (Despatch of Oct. 24.) "The Governor then goes on to state that during my absence, the Executive Committee caused the Haytien refugees in this island, and some other persons who were suspected of being concerned with or of encouraging seditious movements, to be given into custody. I quite concur in the propriety of their steps, and no further outbreak occurs. I hope to be able, in a short time, to proclaim a general amnesty, except to actual murderers, upon the rebels coming in and submitting to the Queen's authority, and I yet hope that the disturbed districts will be sufficiently quieted in time for the sugar crops, now nearly fit for cutting, to be reaped.—E. Eyre. Oct. 24, 1865."

(*a*) Thus, the following report, addressed by Lieutenant Adcock to Brigadier Nelson, on the 25th October:—"Sir,—I have the honour to inform you that, on the 23rd instant, I visited several estates and villages. The people had, for the most part, deserted their dwellings, and taken with them any plunder they may have had, although leaving several traces behind them. I burnt seven houses in all, but did not even see a rebel. During the day I searched the whole country round about, but the state of the roads through the bush—mud up to the horses' knees—prevented me going quite as far as I would have wished. I, however, consider the state of the country quiet throughout this district. I caused information to be given to all the negroes round about, that if they returned to their work they would not be

the measures of martial law, designed to meet that which has already been pointed out as the great danger to be met and dealt with; the withdrawal of the peasantry into the woods, where they where lurking, disposed to renew the insurrection when the military should be withdrawn.

It was only after careful and laborious scouring of the woods, that the officer in command of a detachment, in a different direction (*a*), reported that he believed rebels no longer to exist in that neighbourhood, and on several days following similar reports were received upon other districts, a result, it will be observed, not obtained until the leader of the rebellion had been executed, nor until the military force had been largely augmented (*b*). The military commander

molested, provided they were not actual murderers, or concerned in a riot where murders were committed. In the evening 140 returned to Mr. Harrison, and a large number came to other planters on the morning of the 24th. On returning to Golden Grove in the evening, 67 prisoners had been sent in by the Maroons. I disposed of as many as possible, but was too tired to continue after dark. The rain and roads had completely knocked up both horses and men this day. On the morning of the 24th, I started for Morant Bay, having first flogged four, and hung six, rebels. I beg to state I did not meet a single man upon the road up to Leith Hall; there were a few prisoners here, all of whom I flogged, and then proceeded to John's Town and Beckford. At the latter place I burnt seven houses and one meeting-house; in the former, four houses. We came so suddenly upon these two villages that the rebels had no time to retire with their plunder; nearly 300 rushed down into a gulley, but I could not get a single shot, the bushes being so thick. We could all distinctly hear their voices in the wood all round, but after the first rush not a man was seen; and to follow them with any advantage, impossible."

(*a*) From Easington Court-house, on the 26th October, Lieutenant Oxley, R.N., in command at that station, reported:—"I beg to state that now I have been over the whole of the neighbourhood, and from information received, and from what I have seen myself, I have come to the conclusion that rebels no longer exist in the vicinity."

(*b*) The reinforcement arrived on the 28th October, but were not distributed until some days later. Thus, on the 2nd November, Colonel Whitfield reports from Falmouth, under date November 2, that, in accordance with instructions, he had landed troops at Port Maria, arms at St. Ann's, troops at Dry Harbour, for Brown's Town, and proceeded on to Falmouth, where he landed his head-quarters, sending on his detachment to Lucea. Reports have been received from Savanna-la-Mar and Vere, that all was quiet in these districts. At Montego Bay there was a slight alarm.

now saw that the time had arrived for the cessation of the severities of martial law, though not for measures of precaution.

The orders issued (*a*), about this time, by the General in active command, showed an anxious desire to confine the acts of the military within the strictest limits of military discipline, and to take those precautions against excesses or outrages by the soldiers, which, in the first heat of the rebellion it would probably be difficult to prevent. The terrors of martial law itself were held out to repress them.

And the scope of his orders (*b*), at this time, to officers in

Colonel Whitfield left the first detachment at Brown's Town. All was perfectly quiet there.

(*a*) Order of General Nelson, 25th October:—"The officers commanding will respectively forbid any man to enter the house of anyone, under any pretext whatever, unless accompanied by a commanding officer. Any man found doing so will be handed over to the Provost-Marshal, for summary punishment." It is to be borne in mind that, when martial law was in force, the soldiers themselves, or the volunteers, or civilians accompanying them, were subject to it, and could be summarily punished for excesses or outrages, and if necessary, even by death. The despatches of the Duke of Wellington, edited by Colonel Gurwood, contain many instances of summary executions of his soldiers, by order of the Provost-Marshal, for outrages, even in an enemy's country.

(*b*) Thus, on the 2nd November, in his order to an officer who was to relieve a detachment:—"It will be necessary for you to exercise strict control over the men of your detachment, and not to permit any man to quit his quarters for the purpose of foraging, &c. Care to be taken to preserve unanimity with overseers and others. You are not sent to your post for the purpose of punishing the negro, but to maintain order, and to afford protection to the inhabitants generally. You are not to inflict summary punishment if any supposed rioter be sent as prisoner to you; be good enough to inquire into the case, and, if you consider the same as of a serious nature, send him to my head-quarters, with the evidence against him. You will doubtless have many prisoners brought before you, and many possibly through the animus of the inhabitants. Petty cases of larceny I cannot interfere with; they must hereafter be dealt with by the civil authority. I am quite aware you will be much pressed to administer punishment to supposed criminals, and you must be firm, temperate, and judicious in all communications with civilians. You are not, on any account, to march out for the purpose of attacking anybody. The rebels, if reported in force, which I apprehend is quite impossible, must not be approached without my distinct order in writing. You will be pleased strictly to conform to the instructions herein,

command, was to keep the men in strict control, and not to act for punishment, but for protection and the preservation of order, there being then an end of overt acts of rebellion; and he distinctly directed them not to inflict summary punishment, but to send serious cases to him.

As to the province and function of the Provost-Marshal (*a*), it was officially declared by the General in active com-

and any deviation therefrom will be a source of discomfort to yourself.—(Signed) A. A. Nelson, Brigadier-General Commanding Field Force."

(*a*) The Brigadier-General, having received a complaint against the Provost-Marshal, near the termination of martial law, wrote the following: "6th Nov. 1865. Memo. for the Provost-Marshal. Having given Mr. Marshalleck's complaint, and the Provost-Marshal's explanation, my grave and serious consideration, it is my duty to inform the Provost-Marshal, that in every way connected with the case, he has exceeded his powers, and adopted a course I most strongly reprehend. Mr. Marshalleck states a policeman told him the Provost-Martial wanted him. Mr. Marshalleck, on receipt of such message, proceeded to the police station; even if he did not know the 'countersign,' in no way whatever was the Provost-Marshal therefore justified in sending him to jail? Had he been a 'stranger,' which he was not, his case should have been enquired into. Briefly—The Provost-Marshal, in acting as he did, is open to very severe censure; much of which I withhold in consequence of the good service he has done, and because I hope this error in dealing with Mr. Marshalleck was the result of 'over zeal;' but this must be curbed, for I cannot permit individuals, appointed by constituted authority, Justices of the Peace, to be insulted, thereby in their persons tending to lower, not only themselves individually in the eyes of the public, but, what is of far more consequence, 'to lower the civil authority in the island generally.' Mr. Marshalleck was well known to be a 'Justice of the Peace,' and under no circumstances whatever, myself being on the spot, was his arrest and commitment to jail justifiable. The Provost-Marshal appeared to consider his powers more extensive than they are. He is simply entrusted with authority to inflict summary punishment, on any individual, whom he may detect in the commission of offences against order and discipline, and this is only to be exercised upon the commission of any particular offence which may call for an immediate example. No one knows better than myself the necessity, under past circumstances, for speedy action by the Provost-Marshal—these now are passed. I, therefore, peremptorily forbid any summary punishment being inflicted within the camp henceforth; and all cases of serious nature are to be referred for my decision, or that of my A.D.C., to whom alone I shall delegate authority to dispose of such. A. A. Nelson, Brigadier-General Commanding Field Forces, Morant Bay, 6th November, 1865." The Bri-

mand to be, to inflict summary punishment on any one he might detect in the commission of an offence against order and discipline; and this power was to be exercised on the commission of any offence, which called for an immediate example. The Provost-Marshal having, in several instances, shortly before the cessation of martial law, when the great danger was over, exceeded his powers, was severely censured by the General in command, and strictly ordered to confine himself to his proper functions, the punishment of actual offences within his own observation, or the execution of orders or of sentences.

As regards the danger of renewal of the insurrection; as the Governor could only act upon the information he received (*a*); whether these communications were well or ill

gadier in his evidence stated, "Until I issued my memo, Mr. Ramsay had authority to deal summarily with minor cases. I had to speak to the Provost-Marshal for 'over-zeal' occasionally. His duties were most onerous, and he was terribly harassed by all kinds of persons—and it is not surprising, in some few instances, he erred in the performance of his duties."

(*a*) The Custos of Westmoreland (Mr. Vickers), Oct. 19, 1865.—"Although general tranquillity apparently prevails in the parish, considerable excitement exists in the Bluefield's district, owing to there being a case of felonious shooting against several persons in that district, for trial at the coming assizes. Two Justices of the Peace, and the clerk of the vestry and collector of dues, waited upon me here to-day, and informed me that it was probable that large numbers of people would be brought into Savanna-la-Mar, and that great excitement would exist at the opening of the Circuit Court, on Monday the 30th instant. I am of a similar opinion. Should this extreme excitement result in a riot, which is not improbable in the present helpless state of the authorities, I would respectfully suggest to his Excellency the advisability of directing a gun-boat to proceed to Savanna-la-Mar, to arrive in that port on the 30th instant." Oct. 19.—"I have now to submit for the information of his Excellency the Governor, that certain vague rumours have been long in circulation as to nightly meetings being held in that district, and of the intention of the parties to burn the Court-house at the sitting of the Circuit Court, should justice not be administered according to their preconceived notions. Mr. Tate, one of the parties to be indicted for feloniously shooting, has been informed (in an anonymous letter), that at one of these nightly meetings, it was decided that he should be murdered in the Court-house, if acquitted. These vague rumours have had the effect of greatly alarming the inhabitants of the district."

grounded, would not, as regarded the exercise of his judgment, be so material, as the facts they stated, and the effect they were calculated to produce upon his mind; especially as to the deficiency and disparity of military force, as a protection from rebellion, should it again rise. And it is to be observed, as the object of government is that confidence which can only result from the sense of security, if, in point of fact, there was widespread alarm and apprehension, whether well or ill-grounded, that itself was a fact, which could not but be an important element in his judgment.

The propriety of relaxing or terminating martial law would depend upon the advices received by the Governor. At this time (*a*), at the end of ten days from the outbreak of the rebellion, and nearly that time from the declaration of martial law, advices were received by the Governor of outrages threatened or committed, of inefficiency of civil and military force to prevent their perpetration, and of general alarm and apprehension, showing a sense of danger still impending.

(*a*) "The Custos of Clarendon to the Hon. E. Jordan, Col. Sec., October 21, 1865.—I had the honour of addressing you yesterday, representing the people in this parish as quiet and orderly, since which I regret to say that an attempt to burn down the Court-house has been discovered. . . . With the exception of this act, I have no reason to alter the opinion I gave yesterday. I have thought it right to put the volunteer force under arms, and they will be quartered at the Court-house. I beg to report that the police force are without ammunition." "Mr. Lyon to Mr. Jordan, October 30, 1865.—I have the honour to acknowledge the receipt of your communication, dated the 26th instant, intimating that a company of soldiers would be sent here forthwith; the town is still in great excitement, as in case of emergency there are weapons of no kind with which to arm ourselves for protection. Matters look doubtful in respect to the peace of the community, as last evening a letter, copy of which is inclosed, was picked up opposite the police station by a man named Bernard. The justices have offered a reward of fifty dollars to any party giving information as to the writer of the article. A letter from Mr. Hutchinson, Wesleyan Catechist in this town, has just been handed to me, which I inclose for his Excellency's consideration. "The Rev. A. Lindo to Mr. Hollingsworth.—October 25, 1865.—There is a dense population in this village and its neighbour-

It is manifest that the considerations which would govern the question of the continuance of martial law, would be very much the same as those which would determine the question of originally declaring it, and those would be mainly considerations of military exigency (*a*), founded upon danger, and the means of meeting it; as to which the Governor (*b*) could only judge by the reports

hood, and in times like the present one cannot but feel some anxiety on account of the defenceless condition of the place. This anxiety is increased by the fact that a large proportion of the peasantry has not been under the most salutary influence."

(*a*) "The Custos of Westmoreland to the Governor:—Grange Hill, October 23, 1865.—Since writing to you (19th October), Her Majesty's ship Steady arrived at Savanna-la-Mar on the 20th instant. After consulting with Captain Bullock, of that vessel, and with such magistrates as could be hastily collected at Savanna-la-Mar on that day, it was determined, in consequence of the serious rumours from the Bluefields district, and the state of alarm in which the town of Savanna-la-Mar was placed, to detain the Steady, and assemble the volunteers. I deemed it the wisest course to bring the matter to a crisis before the alleged rioters obtained strength. I ordered the volunteers to assemble at Savanna-la-Mar on the 21st instant. This was promptly done, the men were under arms at 10 o'clock on that day. I held a magisterial investigation, at which all persons supposed capable of giving evidence were summoned to attend. The utmost statement that could be obtained, even from the most excited of the witnesses, was that ten or twelve persons had been drilled with wooden guns. It was decided to issue a notice, cautioning all parties to abstain from drilling, and offering a reward of 100 dollars for such information as should lead to the conviction of any party or parties illegally engaged in drilling from and after that date. I think the demonstration made by the volunteers, backed by the presence of the vessel of war, has done much good. I dismissed the corps on the evening of Saturday, and the Steady proceeded on Sunday morning to Lucea. As regards the necessity for precautionary measures being adopted to guard against any serious riot at the Circuit Court, I am still of the opinion conveyed in my letter to you of the 19th instant."

(*b*) "Governor Eyre to Captain De Horsey, R.N.—October 23, 1865.—Successive communications from Mr. Vickers, the Custos of Westmoreland, as well as letters from other parties, represent the imminent occurrence of an outbreak at Savanna-la-Mar, at or about the time of the opening of the Circuit Court on the 30th instant. It is, therefore, considered essential that a man-of-war should be despatched to the port of Savanna-la-Mar, so as to arrive there on the evening of the 28th instant, Saturday, and that she should remain during the sitting of the court, or until the risk apprehended is over. It is desirable that the vessel sent should be of as large a class as

he received, and which might or might not be exaggerated. The great reason for the declaration and retention of martial law being the inadequacy of military force, it is manifest, and was amply illustrated on this occasion, that the necessity for maintaining martial law must a good deal depend, not merely on the suppression of the rebellion in the particular district, but on the reports received as to the apprehensions of its outbreak in other districts, because the withdrawal of military force thereto would, by increasing the disparity of military force, afford a temptation to a renewal of rebellion.

As the great source of danger, and the great reason for declaring martial law, was the belief in a general spirit of disaffection (*a*); so, after the insurrection was subdued in

is available, so as to land a considerable force on the spot. The same vessel, or any other vessel of war, should then accompany the sittings of the court to the successive localities which it visits, and the sailing of the vessel should be so timed as to enable her to reach each station the day before the sitting of the court. The places and dates at which the respective courts are to be held could be obtained from the Custos, or the judge on the spot, the courts following each other. I should be much obliged if you could carry out these arrangements. It would not matter, so far as the Governor was concerned, whether these apprehensions were well or ill founded, he could only be guided by the information he received on official authority."

(*a*) "The Custos of St. Ann to the Hon. H. Westmorland.—St. Ann's Bay, October 24, 1865.—Although the rebellion is happily and promptly crushed, still I fear its seeds are sown, to bear fruit at some future day. Here we are quiet, and the people cheerful, and almost all express their hope that it will not come here, but none say it shall not. I am ever among them, and tell them it cannot if they come forward, as the good are more than the bad. They then complain they do not know what to do; in fact, they want leading and encouraging, for they are as afraid as we are. Gordon has only two or three adherents here, and these are known only lately. They had not much brains, and only a certain influence: but the people do say, if they are arrested they will fight for them, and so on. From all that I have been able to glean I feel sure that, unless due means are taken to prevent it, there will be a serious outbreak on the 2nd November (court day); for, in the present excited state of the peasantry, a little beginning may lead to sad results. My servant went to Trelawny on Tuesday (as far as Swanswick), and was surprised at hearing the labourers so far away state that there was to be a general 'rise' in Brown's Town on the 2nd November. In re Norman's Land the negroes swore, without hesita-

the place where it first broke out, it would remain necessary to consider whether it was likely to break out again elsewhere; and of course the question would turn a good deal on the indications observed of the general temper and demeanour of the people, and the continuance, either in the proclaimed or other districts, of a spirit of disaffection, and a disposition to rebellion, likely to result in a renewal of insurrection, if not kept under check by terror of martial law. And it would be impossible for the Governor to disregard the general impression and belief, that there was a widespread disposition to *renew* the insurrection.

So it would be very important, as to the question of the continuance of martial law, whether, in the same or other districts, there were secret or disguised meetings, such as had been made use of for the purpose of rebellion, and such as might be used for the same purpose again (*a*). And as to all these matters, so important elements of judgment, the Governor could only judge by the information he received.

tion, that if they are pressed, there will be more blood spilt than in St. Thomas in the East. A vast number of reprobates, &c., spoke freely 'that they wish the rebel force would arrive here, as they are quite ready to join.' I hear that men at Ocho Ries have been using most seditious language, and that the magistrates have not apprehended them. At Finger-post a man even declared that he had been at the seat of the rebellion, and that he would bring about the same state of things here.—St. Ann's Bay, 27th.—Here a man has made himself notorious by pulling down the Governor's proclamation. Nothing done to him. A volunteer declared publicly that he wished to see the bay run with the blood of white people," &c.

(*a*) Mr. Hutchinson to Mr. Lyon.—"Wesleyan Mission House, Lucea, Oct. 30, 1865.—Having been informed that secret religious meetings are being held in this neighbourhood, under the name of 'revival meetings,' and that such meetings are held all night, and that persons come from a great distance to attend them—this is to inform you of the same; and while I believe these people to be without any evil design, at the same time I believe them to be just the material for evil-disposed persons to work on, and that their religious fanaticism might soon be changed to rebellious furore." The Rev. F. Swaby to the Custos of Manchester.—"Mount Olivet, October 28, 1865.—Information has been given to me by my neighbour, Mr. Webbe, and other white emigrants, that assemblies of persons from St. Ann's Parish are taking place near their residence, and they are fearful these gatherings may be for evil." Mr. Salmon to Governor Eyre.—"Malvern, October

Even, although, therefore, the reports from the district where the rebellion had broken out (*a*), had satisfied the Governor that the rebellion had been crushed there, and the principal persons concerned in it, killed or captured, this would not be sufficient at once to render it prudent to dispense with martial law, though it would warrant arrangements with that view; particularly as to the disposal of those taken under martial law; and, in the meantime, might warrant the proclamation of an amnesty, as a preliminary measure of policy.

Although, however, the pressure of martial law was thus, as far as possible, lightened and confined to measures protective and preventive, rather than punitive, no one considered it prudent to think of removing it altogether. The most important element in the ques-

81, 1865.—Meetings, I am informed, have been called at several places by a Mr. Plummer, a Mr. Brydson (a magistrate), and a man Gilling, of this parish, of the inhabitants and small settlers, black and coloured. The persons attending are informed that the growers of produce are imposed upon and cheated."

(*a*) "Governor Eyre to Major-General O'Connor.—King's House, October 26, 1865.—Further reports from the disturbed districts having confirmed the impressions I entertained upon quitting them on the 20th October, that the rebellion existing in the eastern districts of the colony is crushed, and all the principal persons concerned in the outrages, so far as we are aware, having now been either killed or captured, I am of opinion that the time has arrived for making permanent arrangements for this end of the Island, and relieving a large number of troops of Maroons, and eventually of Volunteers, from further service there. I am of opinion that all prisoners should, as rapidly as possible, be tried, and those who are not deserving of death, or flogging, be released. It is not desirable, with our over-crowded jails, to sentence prisoners to imprisonment, nor would I advise that flogging should be resorted to more than can be helped. The prisoners, sent yesterday to Up Park Camp, should be sent down, to be forwarded with the papers and documents, and any evidence against them, to Morant Bay, to be dealt with there by court-martial, as there is already evidence at that place regarding them. It is my intention to proclaim a general amnesty in the County of Surry to all except those who have been participators in the murders, excepting those who are found in possession of stolen property, and excepting those who are now prisoners awaiting trial, upon their coming in and reporting themselves to the civil or military authorities as submitting themselves to the Queen's authority."

tion of the declaration or continuance of martial law being the inadequacy of military force, it was considered that (*a*) before the cessation of martial law would be prudent, or even an amnesty, it would be necessary to secure such an augmentation of military force, which should be adequate to raise the defences of the island to a proper position of security; and accordingly the project received anxious attention, showing a deep sense of danger still impending, if not danger imminent.

It was not until after the reinforcement of the military force, and after great discussion as to its disposition and distribution, and much consideration and consultation (*b*)

(*a*) "Governor Eyre to Major-General O'Connor; dated October 27, 1865.—As the troops sent for by your Excellency from Nassau have arrived, and those applied for from Barbadoes may be shortly expected, I have the honour to submit that the following arrangements should be made for preserving the permanent peace and good order of the island, and for preventing the occurrence of any further outbreak of rebellion, or for putting it down promptly, should any further rising of the negro population unfortunately take place. I would propose that the following numbers of troops should be located at the additional stations hereinunder specified:— . . . . This would make a total of 550 men, which I consider to be absolutely required for some time to come to insure the safety and tranquillity of the various parishes not contiguous to head-quarters. The ordinary military establishment previously kept up in Jamaica I consider ought still to be maintained for the protection of the capital, and as a reserve to draw upon in case of any emergency arising. I am quite aware of the undesirableness in a military point of view, and in reference to the discipline and organization of soldiers, of having regiments broken up into small detachments, but, under existing circumstances, it is for the present unavoidable. We have abundant and undoubted proof that the same spirit of disaffection and disloyalty which led to the rebellion in St. Thomas in the East exists to a considerable degree in every parish in the island; and in a country so extensive as Jamaica, and affording so few facilities for receiving early intelligence, or for making rapid movements by land, it is absolutely essential that for some time to come a considerable number of points should be occupied as military positions around the coast and island."

(*b*) "Governor Eyre to Major-General O'Connor. King's House, Oct. 28, 1865.—My dear General, from the reports just received from you, from Brigadier Nelson and Colonel Fyfe, I am the more confirmed in my views that the time for an amnesty has arrived. I inclose a note from Colonel Fyfe,

with the General in command and the Commander-in-Chief, that the Governor resolved to declare an amnesty, expressly stating that it would not interfere with martial law; without which they would not, it was evident, have agreed to it.

Accordingly (a) there was a proclamation of an amnesty for all persons in the disturbed district, who should come in and submit themselves, except only such as had been actual participators in the crime of murder or arson; such

received yesterday, on the same subject, which please return when read. As I gather from the Brigadier's letter to you that he has received and referred back to you my official project of an amnesty and certain military arrangements, I should be glad, as early as possible, to receive your views with regard to the amnesty, which in my opinion should (unless some objection or difficulty exist of which I am not aware) be at once proclaimed; and it will necessarily take a couple of days to get them printed and sent for distribution and posting. The amnesty would *not interfere with the martial law*, or with the disposition of the troops."

(a) "Jamaica, ss., October 30.—Victoria, &c.—Whereas we are certified that through the zeal and energy of our civil, military, and naval forces, the wicked rebellion lately existing in certain parts of the county of Surry has been subdued, and that the chief instigators thereof, and actors therein, have been visited with the punishment due to their heinous offences: and whereas we are further certified that the inhabitants of the said districts, lately in rebellion, are desirous to return to their allegiance. Now know ye, that in our Royal clemency and mercy, we do issue this our Royal Proclamation, Hereby notifying that we grant a general amnesty and pardon to all persons in the aforesaid districts, who shall at once come in and submit themselves to our Royal authority, by reporting themselves as so disposed, to the civil, military, or naval authorities, excepting only such persons as have been actual participators in the crime of murder, or of arson, such persons as shall be found in arms, or with stolen property in their possession, after this Our Royal Proclamation; and such persons as are now in custody awaiting trial: And we do further notify to all persons concerned in the late insurrection and rebellion, that it is our Royal command that they do forthwith restore to the proper owners, or deposit with our civil, military, or naval authorities, all stolen property or plunder of whatsoever kind. And we do further enjoin all our loyal and loving subjects to refrain from harbouring, and to give up, to be dealt with according to law, all persons (except as aforesaid), who have been actual participators in the crime of murder or of arson, all such persons as shall be found in arms against us, and all such parties as may have stolen property in their possession, under pain of incurring our highest displeasure, and the penalties by law attaching."

as should be found in arms, or with stolen property in their possession, and such as then awaited trial.

In announcing this step to the Colonial Secretary of State (*a*), the Governor pointed out that it was only the result of the success of military movements in scouring the disturbed district, and in seizing the principal leaders; and that though the district lately in open rebellion was then quiet, it was, in short, only the result of a terrible retribution, and that other districts were even then in such a state of disaffection that if the rebellion had not been crushed, it would have rapidly extended thither.

(*a*) "Governor Eyre to the Right Hon. Edward Cardwell, M.P.—Nov. 2, 1865.—Sir,—I have the honour to report that, since the date of my despatch of the 20th ultimo, everything has continued to progress satisfactorily. As I reported in that despatch, arrangements had been made before I quitted the disturbed districts, for thoroughly examining and scouring the entire country eastward of a line between Morant Bay and Port Antonio, within which, as I then stated, any rebels still at large were hemmed in. This service has been most ably performed by the military, under Brigadier-General Nelson, and by the Maroons, under the skilful management of their Colonel, the Honourable A. G. Fyfe. Many rebels were taken and sent in for trial, and others were shot. Colonel Fyfe also succeeded, with a party of Maroons, in capturing the notorious rebel leader Paul Bogle, who had hitherto eluded all attempts to take him. This movement so completely broke up any small parties of rebels who might, up to this time, still have kept together, that I judged it at once expedient (after expressing my views to the General, and obtaining his accordance) to issue a proclamation of a general amnesty and pardon to all except those actually guilty of murder or arson, or with stolen property in their possession. The districts lately in open rebellion I therefore now consider perfectly quieted and safe, indeed far safer than any other part of the island. The retribution has been so prompt and so terrible, that it is never likely to be forgotten. The accounts from the other parts of the island continue to cause me much anxiety. No actual outbreak has taken place, and I hope none will; but it is manifest that the seeds of sedition and rebellion have been sown broad-cast through the land, and that in every parish there are many prepared, if a fitting opportunity offered, to act just as the negroes did in the eastern parishes. In many parts of the country a sympathy with the eastern rebels, and expressions of a desire or an intention to do the same in their own parishes, have been publicly and openly indulged in; whilst the local authorities, from the absence of any organised force to resist a rising, have not been in a position to take up and punish such disloyal and seditious language or threats."

He pointed out, also (*a*), to the Secretary of State, that the measure would not have been possible, but for the great increase of the military force, thus illustrating that which has already been pointed out, that martial law is necessary mainly through the inadequacy of military force to cope with rebellion on equal terms, and that its scope is rather to meet a danger by anticipation, than to await actual attack; and that if the attack had been waited for, or martial law stopped with the cessation of actual attack, the rebellion would have so spread as to be fatal.

That there may be an imminent danger, after actual in-

(*a*) "Since the arrival of Her Majesty's ship 'Urgent' with troops from Barbadoes, I have been enabled to direct such a disposition of troops as will, if carried out by the military authorities, enable the Executive to keep under check and control nearly every parish in the island; and if it is not practicable in all cases to prevent a rising, we shall be in a position to put it down without much difficulty, as well as to prevent its rapid extension to other parishes, as occurred in St. Thomas in the East. There can be no doubt but that there has been an intercommunication between the negroes of the different parishes, and an intention to act in concert for the destruction of the white and coloured inhabitants, as is proved by the many remarks and speeches which have reached us from all directions, some of them intimating a knowledge that something was about to occur at St. Thomas in the East, and that they were waiting in other parishes to be guided by the action taken there. There does not appear, however, to have been any actually organised combination to act simultaneously, or if there was, it was frustrated by the rising taking place prematurely at Morant Bay. I believe that the military arrangements stated in my letters to General O'Connor, transmitted in my despatch No. 261* of even date, together with the presence of two men-of-war, one on the north and the other on the south coast, constantly visiting the different ports, will render the island secure and restore public confidence; but it will be necessary for a long time to come to keep up an additional number of troops in Jamaica, as well as to have a man-of-war frequently visiting all the outports." So to the Governor of Bardadoes:—"I beg to thank your Excellency, both in the name of the colony and in my own, for the prompt and ample assistance thus sent to us. The rebellion has been quelled in the eastern districts of the colony where it first broke out and spread, but a very unsatisfactory state of feeling still exists in nearly every parish in the island, in many of which great apprehensions have been entertained of a rising, and in any or all of which it might occur. The troops from Barbadoes have just arrived, in time to enable the Government to control and keep down this seditious spirit, and I earnestly trust that no further outbreak will take place."

surrection has ceased, was illustrated at the time by the numerous and alarming reports of nightly drilling and secret meetings, and a widespread sense of insecurity and apprehension, and such pressing applications for military protection. And that in the opinion of military men the scope of martial law is to meet this danger, and not merely to suppress actual insurrection, was illustrated by the military reports sent in (*a*).

In the view of the military Commander, even at that time, martial law not only ought not to be discontinued, but should have been extended into other districts, where disaffection and a disposition to rebellion existed (*b*). But

(*a*) "The Magistrates of Montego Bay to Colonel Whitfield.—November 1, 1865.—It having come to the knowledge of the undersigned that the negroes inhabiting the districts at the back of the Kew Park, viz., Mountain Spring and Lamb's River, have been holding nightly meetings for some time past, and, moreover, have been seen in the early morning as if undergoing a drill; that conversations of a most rebellious and seditious nature have been very recently overheard, and reported to us, the Magistrates in this interior, we deem it necessary, to prevent an outbreak, that a number of troops be despatched as early as possible in aid of the Civil Power." "Colonel Whitfield to the Commander-in-Chief.—From the little I have seen of this part of the island, and the great difficulty experienced in procuring means of transport, I am of opinion that Trelawney, St. James's, Hanover, and Westmorland should be immediately placed under martial law, as serious difficulties may arise from the great indifference shown by the labouring classes to any orders issued by me in my present useless position, and the sluggish manner in which they are obeyed. I trust the Major-General will, at his earliest convenience, recommend his Excellency the Governor to place the above parishes under martial law, or my presence here, with my present small force, will be of little service to the colony." To this the Commander-in-Chief added:—"I endorse the opinion of Colonel Whitfield, having been convinced from the first breaking out of the rebellion that the whole island ought to have been placed under martial law.—Kingston, November 3, 1865."

(*b*) "Governor Eyre's despatch to Mr. Cardwell, Nov. 3.—Colonel Whitfield forwards communications from the Justices' meeting, at a place called Knockalva, in the centre of the country, on a line between Savanna-la-Mar and Montego Bay, expressing considerable apprehensions, and stating that the negroes were having nightly meetings, were supposed to be drilling, and were known to use openly seditious or rebellious language. Colonel Whitfield complains 'of the great indifference shown by the labouring classes to any orders issued by him in his present useless position, and the

in the view of the Governor, as communicated to them and to the Secretary of State, martial law was not to be declared in districts where, although seditious language had been used, no actual outbreak had occurred.

And although the Governor did not, on consideration, see cause to extend martial law, it will not be deemed surprising that he should have continued martial law a little longer, and that in his next despatch to the Secretary of State, he should have referred to this as a confirmation of the views he had taken of the danger, and the necessity for martial law (*a*).

sluggish manner in which they are obeyed.' It must not, however, be forgotten, that no disturbance has yet occurred, and that as the district is not under martial law, the ordinary civil relations between employer and employed are still in force. Finally, Colonel Whitfield recommends the immediate proclamation of martial law in five parishes, and General O'Connor has appended a minute that 'he endorses Colonel Whitfield's opinion,' adding that he 'has been convinced from the first breaking out of the rebellion, the whole island ought to have been placed under martial law.' My own views being strongly adverse to the establishment of martial law in parishes in which, although excitement exists and seditious language has been openly used, no actual outbreak or disturbance has occurred, I summoned my Executive Committee, and submitted to them Colonel Elkington's communication to Colonel Hunt, as well as some further reports from the westward, explaining what my views were, and the grounds of them."

(*a*) "Governor Eyre to the Right Hon. E. Cardwell, M.P. November 4, 1865.—Late last evening, an express arrived from General O'Connor, forwarding me a further communication from Colonel Whitfield, a copy of which is enclosed. The report states that all was quiet in the district, and that Colonel Whitfield withdraws his application that martial law might be proclaimed. General O'Connor endorses this view, and states, 'martial law, from present appearances, I consider unnecessary.' These additional reports only confirm me in the justness of the views I entertained from the first, and in the soundness of the policy I have adopted in the arrangements directed for the preservation of public tranquillity. Undoubtedly there has been, and is, a widespread feeling of disaffection, and a tendency to sedition and rebellion, but there is no organized combined action, and consequently the location of a small body of troops at a great many different points has the effect of keeping the country contiguous to each of these points free from any actual outbreak." So again, "Governor Eyre to Major-General O'Connor. November 3, 1865.—Referring to my communication, requesting that fifty troops might be stationed temporarily at Black River

That the declaration or continuance of martial law must mainly turn upon military considerations (a), and that these considerations even now pointed strongly, not only to its continuance but its extension, was manifest from the fact that the military Commanders, upon military grounds, strongly pressed the extension of martial law, and that their views had to be opposed and combated by the Governor, only on the ground that no outbreak of rebellion, in other districts, had yet occurred.

In the correspondence which ensued between the Governor and the Commander-in-Chief on the question of the distribution or the concentration of the troops, the former desiring distribution, the latter concentration, both with

and fifty at Lucea, I should be obliged by your Excellency's informing me whether such arrangements have been carried out, as both districts are in an unsettled state, and without any adequate protection." To this the Commander-in-Chief replied, "that he had not troops available for the Black River, but had sent a detachment to Lucea."

(a) "The Governor to the Commander-in-Chief, dated November 4, 1865. —I have the honour to acknowledge the receipt of a communication from Colonel Elkington, addressed to Colonel Hunt, for the purpose of being laid before me, containing a report from Colonel Whitfield, in command of the Military Division in the Western districts, and other papers. These documents, together with other communications relative to the state of the western parishes, have been carefully considered by myself and the Executive committee. We are of opinion that strong indications exist of a considerable amount of excitement and disaffection in most of the western parishes, especially along and contiguous to a line between Savanna-la-Mar and Montego Bay, the centre portions around Knockalva, Seaford Town, Kew Park, &c., being apparently the most disturbed at present. At the same time other portions of the western parishes, though, as far as we are aware, free from any actual disturbance, are in a very unsettled state. In order to meet possible contingencies, and afford the largest amount of protection to the loyal and well-disposed inhabitants, we are of opinion that Black River and Lucea should be at once occupied by troops, as originally proposed, &c. With regard to the immediate proclamation of martial law in the parishes of Trelawney, St. James, Hanover, and Westmorland, as requested by Colonel Whitfield, I would remark that as no actual outbreak exists in any of them, I do not consider it will be politic or right to adopt the course suggested at present. Should any serious disturbance take place, I should be ready to recommend its adoption to a Council of War, which would have to be summoned to consider the question."

reference to considerations of military exigency, the Governor entered largely into those considerations, and pressed particularly the paramount importance of the presence of military force, for the purpose of preventing any further outbreak of a rebellious spirit, which he believed still to exist in the island (*a*).

In the correspondence which took place upon the subject (*b*) it was pointed out by the Governor that when the

(*a*) "Governor Eyre to General O'Connor. 29th October.—Neither war nor actual rebellion exist at present in the western districts: there are no parties in arms against us, nor is there any organised body of negroes, so far as I am aware; consequently there is at present no requirement for a large force in any one position, and no likelihood of any serious opposition being made to a trained military body of even fifty men only, aided, moreover, as they would be, by volunteers, police, or the resident settlers, in the case of any disturbance. The principal positions at which military support is considered to be required for a time are comparatively isolated from each other, with no very rapid or constant intercommunication, and that an outbreak might occur at any one of them, and the white population be massacred, and property destroyed, as at Morant Bay, before aid could be rendered from a position only a few hours off in point of time. A steamer would not remedy this liability. I would remind your Excellency that, in the case of Morant Bay, the Executive had information that troops might be required at 8 a.m. on the day of the massacre, that is, ten hours before it took place. Every exertion was used by civil, military, and naval authorities to render assistance promptly, yet it was too late, although Morant Bay is not more than three and a half or four hours' steaming from Kingston. In the existing state of matters in Jamaica, with seditious language, expressions of sympathy with the rebels of the eastern districts, or positive threats openly and publicly made use of in many places, it is essential that such arrangements should be made, by obtaining the support of small bodies of military, as would enable the Government to capture and punish the offenders without incurring the risk of allowing an actual rising of the negro population to take place, and perhaps gain head. What is now required in the western provinces is, not to undertake military operations where no actual rebellion exists, but to make such a disposition of the forces available for service in the colony as will prevent rebellion breaking out, will, as far as such can be provided for, render life and property safe, and will give a feeling of confidence to the settlers."—(Parl. Pap., part 1, p. 70.)

(*b*) "Governor Eyre to Major-General O'Connor. November 6, 1865.—I have the honour to acknowledge the receipt of your Excellency's letter of the 4th instant, transmitting, for my perusal, a Report from Colonel Whitfield, dated the day previous, in which that officer reports that all

inadequacy of military force, which was the great reason for martial law, was remedied—its distribution in the disaffected districts alike tended to prevent outbreaks and to restore peace and confidence, and that there was not the less necessity for the presence of military force, in such districts, merely because they were quiet in outward appearance, provided there was still the disposition to rebellion.

The Governor, (*a*) addressing the Colonial Legislature

appeared tranquil in his neighbourhood, and that the movement of a detachment of fifty-five men from Montego Bay to Ramble Village, where serious apprehensions had been entertained by the local magistrates that an outbreak was imminent, had had the effect of allaying those apprehensions, and preserving the peace. This is the same neighbourhood which the Custos of Westmorland and other parties reported to be in an excited state. The effect thus produced by moving a body of troops into a district in which disaffection or sedition are latent, is another instance, like those of Brown's Town, Vere, and other places, of the soundness of the policy by which I have been guided in desiring to occupy temporarily a considerable number of posts at such places as, from the character of the population or local circumstances, we had reason to fear might become the theatre of outrage. I believe that if this policy is continued for some little time, the country will settle down into its usual quietude, and that before long it will be practicable to withdraw many posts, and concentrate the troops at two or three principal points; but I do not think it would be wise to withdraw these posts at once, merely because the district *around them is quiet; the presence of the troops keeps them so*, and it certainly is desirable that they should all be maintained for the present."

(*a*) "It is my duty to point out to you that satisfactory as it is to know that the rebellion in the eastern districts has been crushed out, the entire colony has long been, and still is, on the brink of a volcano, which may at any moment may burst into fury. There is scarcely a district or a parish in the island where disloyalty, sedition, and murderous intentions are not widely disseminated, and in many instances openly expressed. The misapprehensions and misrepresentations of pseudo-philanthropists in England and in this country, the inflammatory harangues or seditious writings of political demagogues, of evil-minded men of higher position and of better education, and of worthless persons without either character or property to lose—the personal, scurrilous, vindictive, and disloyal writings of a licentious and unscrupulous press, and misdirected efforts and misguided counsel of certain ministers of religion, sadly so miscalled if the Saviour's example and teaching is to be the standard—have led to their natural, their necessary, their inevitable result, amongst an

about this time, shortly before the cessation of martial law, declared his belief that, though the rebellion in the eastern districts had been crushed out, the entire colony had long been, and still was, on the brink of a volcano, which might at any moment break out in fury; and that there was scarcely a district or a parish in it where disloyalty, sedition, and murderous intentions had not been widely disseminated, and in many instances openly expressed.

And that a mighty danger even then still threatened the land, arising from a general spirit of disaffection, the result of mischievous agitation, tending to excite an ignorant and excitable population to rebellion, arson, and murder. All which the Legislative Assembly, in their address, entirely affirmed, pronouncing, at the same time, an em-

ignorant, excitable, and uncivilized population—rebellion, arson, and murder. A mighty danger threatens the land, and in order to concert measures to avert it, and prevent, so far as human wisdom can, any future recurrence of a similar state of things, we must examine boldly, deeply, and unflinchingly into the causes which have led to this danger. I know of no general grievance under which the negroes of this colony labour. Individual cases of hardship or injustice must arise in every community; but, as a whole, the peasantry of Jamaica have nothing to complain of. They are less taxed, can live more easily and cheaply, and are less under an obligation to work for subsistence, than any peasantry in the world. The same laws as to the imposition of taxes, the administration of justice, and the enjoyment of political rights, apply to them and to the white and coloured inhabitants alike. They ought to be better off, and more comfortable, and more independent, than the labourers of any other country. If it is not so, it is due to their own indolence, improvidence, and vice, acted upon by the absence of good example and of civilizing influences in many districts, and by the evil teaching and evil agencies to which I have referred in all. It is a remarkable fact, too, that many of the principal rebels in the late outbreak have been previously well off and well to do in the world, possessing lands, cottages, furniture, horses, mules, or other property, and with an education above the average of the peasantry. It is necessary to bring these facts before you, in order to convince you how widely spread and how deeply rooted the spirit of disaffection is, how daring and determined the intention has been, and still is, to make Jamaica a second Hayti, and how imperative it is upon you to take such measures as, under God's blessing, may avert such a calamity."

phatic and grateful approval of his conduct in the suppression of the rebellion (*a*).

Referring to his Excellency the Governor's speech at the opening of this session, wherein his Excellency the Governor has stated that "a mighty danger threatens the land, nd in order to avert it, and prevent, so far as human wisdom can, any future recurrence of a similar state of things," and that the Legislature "must examine boldly, deeply, and unflinchingly into the causes which have led to this danger," the Legislative Assembly shortly afterwards resolved, "That his Excellency the Governor be requested to lay before this house all such information as may enable the house to deal with this question in the manner indicated in his Excellency's speech, and as may not be inconsistent with the interest of the public service," with a view, as it turned out, to the retention of a larger military force in the island.

In answer to which, the Governor pointed out that the sources of information on which he had founded his statement were, many of them, necessarily of a nature not admitting of being produced in a formal or official shape, and rested rather on oral information, and general belief,

(*a*) On the 8th instant, the Legislative Council presented to his Excellency the address which they had voted. In it they say:—"While joining your Excellency in acknowledging the zealous and able services of his Excellency the General Commanding, the senior naval officer, and of the military and naval forces, as well as of the volunteers, we desire also to record our grateful thanks to your Excellency for the energy, firmness, and wisdom with which you have carried the island through this momentous crisis. We are well aware that the slightest hesitation on your part would have been fraught with the most imminent danger to the lives of the loyal inhabitants throughout the island, and we are well assured that all our loyal fellow-colonists unite in the expression of thanks which it is now our privilege to convey to you. We entirely concur in the painful statement your Excellency has made, that there is scarcely a district throughout the island where disloyalty, sedition, and murderous intentions are not widely disseminated, and openly expressed. We agree with your Excellency as to the causes which have created the danger that now threatens the country, and will heartily co-operate with you in endeavouring to remedy this state of affairs."

and notorious facts; and he appealed to their own knowledge and experience, the results of which they had already amply attested (*a*).

The Governor, however, laid before the Colonial Assembly a military report (*b*), made after an inspection of the

(*a*) "With every desire to place the fullest information before the house, it is manifestly impossible to produce all the grounds upon which the opinion above quoted was based. It consisted partly of oral information from gentlemen or others connected with the different districts, partly of information contained in private letters to the Governor, and in letters to members of the executive committee, or to other gentlemen of position, which were shown to the Governor; partly from representations from custodes or magistrates, of the alarming state of their districts, of seditious and threatening language being openly indulged in, of threatening letters, of night meetings of the peasantry, of unsanctioned drilling being carried on in various places, of statements of the insecure and unprotected state of the parishes, of applications for troops, for men-of-war, for arms, for extra police or constables, for formation of volunteer corps, &c., &c., the whole tending to show that sedition and rebellious intention were widespread through the land, and that in most of the parishes, the residents, who were best able to judge of the temper and feeling of the peasantry around them were in a state of great apprehension and alarm. Even in Kingston, well protected as it is by a large military force, and by the volunteers, so convinced were the magistrates that a state of things existed which could not be met by the ordinary civil arrangements of the country, that they especially requested the Governor to return from the seat of the rebellion, in the eastern parishes, in order to place Kingston also under martial law. But the best test, perhaps, of the accuracy of the information upon which the Government founded its opinion, is to be found in the opinions of the members of the two branches of the legislature, in their replies to the opening address. The gentlemen comprising the Legislative Council, coming from various parts of the island, and with the best means of obtaining full and accurate information, absolutely endorsed the views expressed in the Governor's opening address, that 'there is scarcely a district throughout the island where disloyalty, sedition, and murderous intentions are not widely disseminated and openly expressed;' whilst the members of the honourable house itself, many of them also coming from the country districts, and possessing similar means of knowing what is going on, to that enjoyed by the members of the Legislative Council, express their opinion that nothing but a strong government can prevent this island from lapsing into a second Hayti. The grand jurors of Hanover and St. James have also expressed their opinion that the spirit of disaffection is widely spread through the land."

(*b*) Colonel Whitfield to Governor Eyre. November 21, 1865.—

island, which attested the existence of a seditious and disloyal spirit throughout; and the fact of a great amount of intercommunication between the different districts, which, coupled with other circumstances, matter rather of personal observation than of formal proof, and deemed by military men of significance, tended to show that the danger still existed.

Numerous official reports (*a*) received after this, attested

(Extract.)—"I did not like to answer your letter of the 13th instant until I had visited all the detachments in my district, and seen enough of the people to give an opinion. I quite agree with you in thinking that a seditious and disloyal spirit pervades the entire island, and that in all probability the negroes would rise, if it were not for the presence of the military. I think that a considerable amount of intercommunication has, and is taking place between the disaffected in the different parishes; for I observe men of sullen and dissatisfied looks riding about the country in all directions. About one-half the negroes look happy and contented; the remainder, as if they would take much pleasure in cutting one's throat. I think the same feeling exists among the women; but I do not think this feeling is confined to that district between Savanna-la-Mar and Montego Bay, but everywhere." . . . . . This report was afterwards ridiculed as founded merely upon sullen looks, which was a complete perversion of its meaning. The substantial fact was the amount of intercommunication evidently going on in all directions; and mention was made of the sullen looks of the negroes as going to lead to that fact, and excluding the idea of mere amusement or diversion. Every one knows that the general manner of the negro is lively and cheerful; and the substitution of a sullen demeanour was, in the view of those who daily saw them, a significant fact. No doubt its importance would depend upon such facts; but it is impossible not to see that it formed one element in judgment.

(*a*) Many of these are printed in the Parliamentary Papers on the subject, parts 2 and 3. They continued to be received, not only up to, but after the cessation of martial law (which was on the 13th November), and up to the correspondence between the Governor and the Secretary of State, which led to the appointment of the Royal Commission of Enquiry; and even afterwards, addresses continued to pour in from all parts of the island, attesting the conviction of the inhabitants, that they had been rescued from a great disaster, the danger of which still continued. There were numerous reports from the police, and letters from persons of position, in support of this belief. For instance, sworn information of secret drilling and arming (Deposition of Coles, Parliamentary Papers, part i., p. 216). and arming (Letter of Police Inspector Wheatley, *ibid*, 186).

similar facts, and led to the same conclusion, and it was not until after anxious consideration, and some opposition from the military and civil authorities of the island, that the Governor, a month after the declaration of martial law, resolved to put a stop to it.

Some of these communications (*a*) illustrated, in a striking

(*a*) For instance, as to drilling, even at night, (Statement of Coles), of which it could easily be said that it was for amusement, &c. So, as to arming; there were found at one place, upwards of a hundred pikes, or spikes made of hardened wood, evidently intended for offensive use, as they could not possibly be of any other use. The report of the Police Inspector:—"Black River, November 16, 1865.—I received a despatch, stating a number of people in the district were armed with spikes. I went up during the night, accompanied by Captain Maxwell and some police, and searched the house, in which I found upwards of 100 spikes made of hard wood; they are about 8 or 9 feet long. Mr. Myers has also sent down some from the Portsea district, also armed with spikes. Mr. Levy says there is no Act to try the people by. I have, therefore, written to ask you how I am to act. I believe all the Revivalists in this parish and Manchester are similarly armed. Mr. Lawrence wished me to apprehend them all in this parish. If I had done so, I would now have had in custody upwards of one hundred. I did not think it advisable, for if they were apprehended, and then discharged, it would do more harm than good. This sect are in the habit of prophesying the destruction of life and property; and if there is not some stop put to their wandering from parish to parish, I am afraid they will take care to make some of their prophecies come to pass. As there appears to be great apprehension amongst some of the people in the St. Cruize Mountains, I have ordered up nine of the police; as the soldiers are now here, I believe they are needlessly alarmed." So it was plain it was only the presence of the *military* which afforded any adequate protection. Yet, when the magistrates desired to know what could be done, the Custos, or Lord Lieutenant, wrote to them in these terms:—"Spanish Town, November 20, 1865.—It is no offence to be in possession of any number of sharpened hard wood stakes, but it may well be coupled with the surrounding circumstances, an index of an intent to rebel, or commit some offence, or one of the offences as are specified in the Island Act, 4th Geo. IV., c. 13, s. 1. If, upon examination of the prisoners, corroborative, circumstantial, or other evidence be obtained, showing a reasonable suspicion of a plot for any such purpose, they should be held to bail to answer for conspiring to, &c., &c.; if not, they should be dismissed with a judicious caution, but without any threat of the possibility of their bringing the infliction of martial law on themselves by the manifestation of a disloyal spirit, and should be informed that the Governor can declare it much more promptly now than heretofore." And headed:—

manner, the necessity of martial law, for the suppression of preparations for rebellion, such as arming or drilling; which at common law, are only circumstances that might be evidence of an offence punishable by the dilatory and doubtful process of criminal prosecution, and which could only be met, either by special statutable enactments, or by martial law.

In the opinion of the persons of the highest position (*a*),

"It is not advisable to apprehend any subject on a charge which, if proven, the law does not contemplate as a punishable crime." The Legislative Assembly passed a special statute to meet the case of drilling, &c., (*Vide ante*, p. 39). But statutes could only be put in force by the civil power, and what would nine or ten police be able to do against 100 men, armed with pikes? And where would the loyal have been, had the military been withdrawn?

(*a*) Letter from Mr. M'Lean to Mr. Carr:—"Lambkin Hill, November 14, 1865, 5 p.m.—I have just heard that Mr. Herbert Lindo has forwarded to the Custos a letter, found in the box this morning, threatening to burn down Gayle Store, Gayle Estate, and Lambkin Hill, and Sharpe and myself denounced, stating that the time is not long. As I have all along condemned the apathy of the authorities here, so I now fear that, as in the rebellion in the east, all these things *will be overlooked till the crash comes*, which I have never ceased to think is not far off here, as they say in the letter. I am sure you will see the necessity of immediate measures of defence being provided, and the risk the property runs of being destroyed. I beg at least you will use your influence with the Governor to have a detachment of troops sent up to this district, for it is quite evident something is brewing. I am going to get a warrant out to-morrow for a man who spoke of setting fire to the estate in October, and was overheard by Munroe, my head man." Mr Lawrence to Mr. Salmon.—"Malvern Police Office, Nov. 16, 1865.—On Monday last I was informed that there were a large number of spears or lances at a place called the Buildings, near Round Hill, and a number of persons, male and female, keeping secret meetings, and have been doing so for a long time past. I immediately sent for the Inspector of Police, and requested him to search the place, and if any such were found, to apprehend all persons. After the search was made, a large number of these spears were found, also a large quantity of stones, a loaded gun, and a paper signed Bogle, with several unintelligible sentences, such as 'the war to begin at Lucea on the 7th August, and buckras and brown men to be killed, also their animals and beasts.' I believe the police apprehended twelve or fourteen persons, and conveyed them to Black River; these would be brought up at the Court to be held at Black River yesterday, and I requested Mr. Wheatle to ask the Magistrates to remand them till you had been consulted as to the mode of disposing of them. 'There being no act

there still existed, not only in the district in which the insurrection had arisen, but in other and distant districts, the utmost disaffection and disloyalty, and the most alarming symptoms of a rebellious spirit.

At the time (a) of withdrawing martial law, the Governor

in force to punish them,' was the opinion of Mr. Wheatle." Letter from Mr. Justice Kerr:—"Gordon Town, November 21, 1865.—I am informed that in no part of Jamaica is disaffection more prevalent at the present moment than in the parish of St. Ann's. That this has been largely owing, there as elsewhere, to the acts of demagogues, and the seditious and disloyal tone of an unprincipled newspaper press, there can be no room to doubt."

(a) "Governor Eyre to Colonel Whitfield. 13th November, 1865. (Parl. Pap. 1, p. 182)—At the time that you arrived the insurrection in the eastern parishes was thoroughly got under, but from information reaching the Government from every direction it was evident that a seditious and disloyal spirit pervaded the entire island, and that in several localities the negroes were prepared to rise and repeat the scenes which occurred in St. Thomas-in-the-East, if a fitting opportunity presented itself; there were also good grounds for supposing that a considerable amount of intercommunication had taken place between the disaffected of the different parishes, and that had the rising not been brought about somewhat prematurely at Morant Bay, it would at a later period of the year have been more general and simultaneous. Under these circumstances, the natural, and, indeed, the necessary action of the Government, was to station small parties of troops as rapidly as practicable at as great a number of distinct positions as possible, having in view, of course, first, the requirements and comparative urgency of the requirements of the respective districts; and secondly, the accommodation obtainable for troops, and the means of supporting them by reinforcements, or by men-of-war, should such support be required. I am quite aware that, in a soldier's point of view, the dispersion of troops in small isolated detachments is not looked upon with a favourable eye, and that, in fact, it is exceedingly demoralizing as regards organization and discipline. But, under the circumstances in which the colony is placed, there is no help for it, and it is better that the troops should suffer in their military organization and discipline for a time, if thereby they can prevent the outbreak of rebellion, than that, by being concentrated and kept in good military order, they should leave openings for the disaffection to gain ground and break into a rebellion, which, once existing, might require a much larger number of troops and a long period of time for its suppression. It is from considerations of this kind that I have felt it my duty to call upon the General to make so many detached stations. That the policy is a sound one, is shown by the result at each station where difficulties were anticipated; the mere stationing of a small body of troops has allayed apprehension, and has so far

explained very clearly that it was only owing to the increase of military force, which allowed of his so distributing it as to subdue the spirit of rebellion, which was everywhere latent and ready to break forth, and could only be kept down *either* by an adequate military force, *or* by terror of martial law.

Before the expiration of martial law, several measures were passed by the Colonial Legislature, one being (*a*), to enable the Governor in future to declare martial law over the whole or any portion of the island, with the advice of the Privy Council. Next, an act (*b*) to enable the Governor to detain persons arrested under martial law.

Then (*c*) there was an act of indemnity against all in-

had the effect of keeping the several districts quiet. It is, however, important to bear in mind that *it does not follow because the districts are quiet, therefore the troops may be withdrawn; it is the presence of the troops that causes this quietude. The tendency to sedition and rebellion is still latent, and requires to be carefully watched, and kept in check for some time to come.*"

(*a*) 29 Vict. c. 3, reciting that by 9 Vict. c. 35, martial law cannot be declared except at a meeting of the council of war, composed of twenty-one members, and that it was at times difficult to collect such a council for the purpose of immediately declaring martial law, which might be rendered necessary by urgent circumstances; and enacting that the Governor should have power, with the advice of the Privy Council, from time to time, to declare the whole or any portion of the island under martial law, and so much of the former act as was inconsistent was repealed.

(*b*) 29 Vict. c. 2, "An act to enable the Governor to detain persons arrested during the prevalence of martial law. Be it enacted by the Governor, Legislative Council, and Assembly of this island, and it is hereby enacted, that, notwithstanding the determination of martial law, after the recent or any future declaration thereof, it shall be lawful for the Governor, with the advice of the Executive Committee, to order, by any writing under his hand, for such time as shall be in such order expressed, the detention of any person who may have been apprehended during the prevalence of martial law, and whose case shall not be adjudicated during that period."

(*c*) 29 Vict. c. 1, "An act to indemnify the Governor, and all other officers and persons concerned in suppressing the late rebellion in this island. Whereas, being seduced by the insidious counsel of wickedly designing persons, many of the Queen's subjects in this island conspired by force to overthrow the constitution and government here established by law; and in furtherance of such their purpose, did, with force, and in con-

dictments or proceedings against authorities, civil or military, or other persons acting "in good faith and of loyal resolve, for the crushing of the rebellion, for anything commanded, ordered, directed, or done, whether in a district in which martial law had or had not been proclaimed, in furtherance of martial law;" that is, during the continuance of martial law, in order to suppress the insurrection and rebellion, and for the preservation of the public peace.

The scope of the act (*a*) being not merely to indemnify

federated multitude, commit on the eleventh day of October, in this present year of our Lord, one thousand eight hundred and sixty-five, and on divers other days then following, in the parish of Saint Thomas in the East, many burglaries, robberies, arsons, murders, and other felonies, with treasonous purpose, in renunciation of their natural allegiance, and to the intent of the general massacre of all loyal and well-disposed subjects of the Queen here dwelling: And whereas upon being informed of such the aforesaid atrocities, his Excellency Edward John Eyre, Esquire, the Governor of this island, with the advice of a Council of War, and in order to prevent the extension of the said rebellious outbreak, did proclaim that martial law should obtain and prevail throughout the county of Surry, with the exception only of the city and parish of Kingston: And whereas, under God's providence, the military and naval forces of the Queen, with the loyal cooperation of others, Her Majesty's faithful subjects in this island, have arrested the spread of this rebellion, and saved the lives of law-abiding citizens from imminent general sacrifice; and whereas military, naval, or civil authorities, necessarily employed in the prompt suppression of the atrocities aforesaid, may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith, for the purpose of restoring public peace, and quelling the rebellion aforesaid: And whereas it is expedient that all persons whosoever, in good faith, and of loyal resolve, have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty. Be it therefore, and it is hereby enacted by the Governor, Legislative Council, and Assembly of this island, &c."

(*a*) First.—That all personal actions and suits, indictments, informations, attachments, prosecutions, and proceedings, present or future, whatsoever, against such authorities or officers, civil, military, or naval, or other persons acting as last aforesaid, for or by reason of any matter or thing commanded, ordered, or directed, or done since the promulgation and publication of the proclamation of martial law aforesaid, whether done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, in furtherance of martial law; that is to say, on, from, and after the thirteenth day of October last past, and during the continu-

all persons for acts done under and by virtue of martial law (which, according to the view of the law already laid down, would not be necessary), but also for acts done, *whether or not* under martial law, if in furtherance of martial law, or for the suppression of the rebellion; and, moreover, the object was, as in the Irish Act (*a*), to provide for conclusive evidence as to what acts should be deemed to have been done under, and by virtue of, martial law.

ance of such martial law, in order to suppress the said insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void; and that every person by whom such act, matter, or thing shall have been advised, commanded, ordered, directed, or done for the purposes aforesaid, on, from, and since the said thirteenth day of October, and during the existence of such martial law, shall be freed, acquitted, discharged, and indemnified, as well against the Queen's most gracious Majesty, her heirs and successors, as against all and every persons or person whomsoever. Second.—And it is hereby also enacted, That his Excellency Edward John Eyre, Esquire, Captain-General and Governor-in-Chief, and all officers and other persons who have acted under his authority, or have acted *bonâ fide* for the purposes and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, are hereby indemnified in respect of all acts, matters, and things done in order to put an end to the said rebellion; and all such acts so done are hereby made and declared to be lawful, and are confirmed. Third.—In order to prevent any doubt which might arise, whether any act alleged to have been done under the authority of the Governor, or to have been done *bonâ fide*, in order to suppress and put an end to the said rebellion, was so done, it shall be lawful for the Governor for the time being to declare such acts to have been done under such authority, or *bonâ fide* for the purposes aforesaid; and such declaration, by any writing under the hand of the Governor for the time being shall, in all cases, be conclusive evidence that such acts were so done respectively.

(*a*) *Vide ante*, p. 42. And when it is said that an indemnity is necessary (*ante*, p. 131), that must be taken to mean *practically*, with reference to errors or irregularities almost certain to occur.

PART IV.

OF THE ENQUIRY BY THE CROWN INTO THE EXECUTION OF MARTIAL LAW.

It has been, it is hoped, established (*a*) in former portions of this work, that those who have honestly, however erroneously, established and carried out martial law, are not, for measures thus taken, legally responsible, either civilly or criminally, even although the measures may turn out, in *the event*, to have been excessive, or beyond the actual necessity of the case (*b*). It would follow, of course, from this, that their conduct in taking these measures, would, properly and constitutionally, be the subject of enquiry by the Crown.

As the scope of the former portions of this work has been to elucidate and illustrate the nature of the authority established under martial law, so the scope of this, the present portion of the work, is to illustrate the authority of the Crown to enquire into, and, if necessary, to censure or punish, the conduct of its servants, civil or military, in establishing, continuing, or carrying out martial law.

The preceding part of the work has presented the materials, *i. e.*, the despatches and military reports, on which the Crown, in the first instance, had to form its judgment, either finally, or as to the necessity for any further enquiry.

(*a*) *Vide ante* Parts I. and II.

(*b*) It has been pointed out, again and again, that this does not apply to acts done, indeed, during martial law, but not *under* it, that is, not really for the purpose of carrying it out, though under colour of it. It only applies, strictly, to acts done under military orders or authority, or, at all events,—if without order—acts done honestly for the suppression of the rebellion; and, as to the latter, there may be a doubt as to legal justification (if they are beyond a common law justification), and this, and similar doubts and errors, form the scope of an Act of Indemnity. (*Vide ante*, p. 230.)

It is now proposed to present the comments made by the Secretary of State upon these documents, or upon the measures they disclosed, so far as they *were* disclosed; the demands for explanation he thought fit to make thereupon; the grounds on which he advised the Crown to institute an enquiry by Royal Commission; and the nature, scope, and results of that enquiry.

The Secretary of State, on receipt of the Governor's despatch (*a*), reporting the breaking out of the rebellion, and acquainting him with the measures which had been taken to suppress the insurrection, and prevent its spreading, wrote a despatch, conveying general approval of the measures thus taken, but reserving a more particular expression of opinion, and pointing out that passages in the military reports required explanation.

The same despatch (*b*), however, contained passages

(*a*) Despatch of Mr. Secretary Cardwell. "November 17.—By the mail which arrived yesterday I have received your despatch, reporting the breaking out of a rebellion of the negroes in the eastern districts of Jamaica, which has involved the cruel massacre of many of the principal white and coloured persons in that part of the island, and acquainting me with the measures which, in concert with the officers in command of Her Majesty's naval and military forces, you have taken to suppress the insurrection, and prevent its spreading to other parts of the island. I have to convey to you my high approval of the spirit, energy, and judgment with which you acted in your measures for repressing and preventing the spread of the insurrection. I have also to express my gratification at the clear and succinct manner in which, under all the great difficulties of your position, you have been enabled to submit to the Governor a narrative of the transaction. It was the first duty of your office to take, as you did, effectual measures for the suppression of this horrible rebellion, and I congratulate you upon the success with which you have attained that object.

(*b*) "No doubt you will have much further intelligence to communicate to me hereafter, on the subject of the measures of severity to which you have felt it necessary to have recourse. If you had time, in forwarding these enclosures, to make yourself acquainted with all their contents, it will have been evident to you that they contain many passages which will require to be explained, as soon as there shall be sufficient leisure for the [illegible] explain fully the proceedings to which they relate. I entirely agree with you that measures of severity, when dictated by necessity and justice, are in reality measures of mercy, and do not doubt it will appear that you have arrested the course of punishment as soon as you were able

which, while recognizing the humanity, and propriety, on the score of humanity, not less than policy, of measures of severity for the suppression of the rebellion, indicated a desire for explanation of certain general statements in the despatches, and which were supposed to indicate that those measures had been carried further than necessary, and for satisfactory evidence that this had not been so.

In a despatch (*a*) a few days later, the Secretary of

to do so, and have exerted yourself to confine it, meanwhile, to ascertained offenders, and to cases of aggravated guilt. I observe with pleasure the hope you express, that if no further outbreak occurs, you will in a short time have been able to proclaim a general amnesty, *except for actual murderers.*" This last sentence clearly implies that, in the opinion of the Colonial Secretary, the severities of martial law might be for some time extended to rebels, not actual murderers; that is, to all persons actively concerned in the rebellion, and this seems to have been the view of the military authorities. In this despatch, no passages were specified as requiring explanation; but in a despatch of the 23rd, certain passages from the despatches of Colonel Hobbs and Captain Hole were specified.

(*a*) "The Right Hon. Edward Cardwell, M.P., to Governor Eyre.—November 23, 1865.—I avail myself of the sailing of the Constance frigate, to address you on the subject of those enclosures in your despatch of the 20th of October, to which I referred in my last despatch as requiring explanation, but which there was not time adequately to examine during the brief interval of the mail. I rely on the assurances conveyed to me in your despatch, and do not doubt that no time will have been lost in checking, at the earliest possible moment, those measures of instant severity which only an overwhelming sense of public danger justifies, and in returning to the ordinary course of legal inquiry, and of the judicial trial and punishment of offenders. It remains, therefore, now to examine the statements contained in those inclosures; and in doing so I shall bear in mind the pressure under which they were written, and the great probability that much remains to be said in those cases which, so far as they are yet before me, require explanation; cases in which, without such explanation, the severity inflicted would not appear to have been justifiable. In calmly reviewing, when the danger is believed to be over, all the occurrences of an outbreak in which the spread of the insurrection over the whole island was apprehended, with the massacre of all the principal inhabitants, great allowance must be made for acts which have resulted from that apprehension. Her Majesty's Government will not fail to bear this consideration in mind, in the judgment which they will ultimately form upon all the circumstances of the present case. I have to request that you will furnish me with copies of the proceedings of the courts-martial, and of the evidence taken in the several cases. These documents

State expressed his hope that no time had been lost in checking, at the earliest moment, those measures of instant severity which only an overwhelming sense of public danger justified, and at the same time admitted that, in calmly reviewing, when the danger was believed to be over, the occurrences of an outbreak in which the spread of the insurrection over the whole island was apprehended, great allowance must be made for acts which had resulted from that apprehension.

In this despatch (*a*) the Secretary of State specified cer-

are referred to in your despatch and the inclosures, but it was no doubt impossible that you should have been prepared to forward them by the last mail. On the case of Mr. Gordon I have addressed you in a separate despatch."

(*a*) "That your attention may be drawn to the nature of the cases which require explanation, I have caused several passages from the reports of the military officers to be extracted, and copied in the enclosed memorandum. I request that you will furnish me with all the particulars in your power, on the subjects to which they relate, and with any other information which may tend to elucidate the whole course of these proceedings. It is my earnest hope that they may be capable of full explanation, and that I may be able to express, as I should desire, without qualification or exception, on account of these circumstances, the commendation to which the officers and men are entitled at the hands of Her Majesty's Government for the promptitude and vigour with which they suppressed the insurrection, and prevented its extension to the other districts of the island. In conclusion, I have to assure you that Her Majesty's Government will await the explanations for which I have called, with all the confidence to which your high character fully entitles you, and with the greatest consideration for the painful anxieties and difficulties of the position in which you have been placed." The reports in question were that of Colonel Hobbs, 15th October (*vide ante*), and Captain Hole's reports, 17th October and 19th October. The principal passages were :—"We secured six prisoners, whom I would have shot, but from the fact of their being unarmed. I now regret I did not do so, as they are no doubt rebels. We have, however, killed between fifteen and twenty of them at extraordinarily long distances, having discovered since several groups of them on the hill sides, and in trees." Again, in his urther report, dated 19th October, Colonel Hobbs says:—"I have reached Stoney Gut from my head-quarters, Moncklands, having shot a number of rebels on the way. I have directed this rebellious settlement to be utterly destroyed." In his report, dated 19th October, midnight, he writes:—"I found a number of special constables, who had captured a number of prisoners from the rebel camp. Finding their guilt

tain passages in the reports of two of the military officers commanding detachments, which he deemed to demand explanation, though not specifying the reasons or respects in which the explanation was required, but apparently pointing to the execution of prisoners not taken in arms in the field.

The Secretary of State in another despatch, about the same time, urged the duty of "checking at the earliest possible moment, those measures of instant severity (*a*) which only an overwhelming sense of public danger justifies;" and of returning to the ordinary course of legal inquiry; and he demanded the copies of the proceedings (*b*) of the various courts-martial, especially in the case of the supposed author of the rebellion; the tenor of the demands indicating an

clear, and being unable to either take or leave them, I had them all shot." And the report of Captain Hole:—"Within a mile of us, every rebel who did not stand, on our approach, to give an account of himself, was shot." So Colonel Hobbs:—"Bogle's valet has been selecting the captains, colonels, and secretaries, out of an immense gang of prisoners just come in here, whom I shall have to shoot to-morrow morning." It is to be observed that these reports had passed through the hands of the military commanders, with tacit or expressed approval, and that they would be best able to say what accorded with military usage.

(*a*) "November 23.—The phrase 'instant' seems to betray a notion that it is only at the time of, or just after, actual outrage and insurrection, that such severities can be justifiable; whereas, as the next line implies—the real scope of martial law is the sense of *danger*; which may exist, and be well justified by known facts, as by a widespread spirit of disaffection, and readiness for insurrection, for some time after the actual insurrection has stopped.

(*b*) Here it is not to be inferred that courts-martial, under martial law, are governed by the ordinary rules of regular military law—a fallacy which pervaded the inquiry in the Ceylon case, and seems, indeed, to have been the main ground of the inquiry, although it is particularly pointed out by all military and legal authorities on the subject. It is well known to military men, and ought to be known to lawyers, that no records are necessarily kept, and no written notes taken, of courts-martial under martial law. In the case of the supposed author of the rebellion, on account of the great importance of his case, notes were made and kept, but not necessarily. The Secretary of State referred to such cases as this, in which it had been stated that notes had been kept.

impression, already combated in these pages, as erroneous, —that the scope of martial law is only resistance to actual outrage or suppression of actual insurrection, instead of the complete suppression of rebellion, the restoration of safety, and the removal of danger.

At the same time (*a*), in a separate despatch, the Secretary of State desired to be furnished with the evidence in the case of the person who had been executed as the author of the rebellion, and to be informed whether the Governor's approval of the execution "rested on evidence of the prisoner's participation in the insurrection itself, or the lesser offence of seditious language, calculated, but not intended, to produce rebellion;" and he also desired explanation of Gordon's removal from a district not under

(*a*) Mr. Secretary Cardwell's despatch, 23rd Nov.—"In your letter to Major-General O'Connor, of the 22nd Oct. (*vide ante* p. 198), you approve the execution of Gordon, which had taken place under the orders of Brigadier-General Nelson, stating that you had little doubt that whatever Gordon's intentions might have been, the rebellion was entirely due to his seditious language. It is necessary that Her Majesty's Government should be, as speedily as possible, placed in a position to understand the proceedings, and that you should send me all the documents and evidence adverted to in your despatches. I wish to know whether your approval of Gordon's execution rested on evidence of his participation in the insurrection itself, or the actual resistance of authority, out of which it rose, or evidence of the lesser offence, of using seditious and inflammatory language, calculated, indeed, to produce resistance to authority and rebellion, but without proof of any deliberate design of producing that result. It is a matter of obvious remark, that Gordon was arrested at Kingston, to which martial law did not apply, and taken to Morant Bay, for trial under martial law. I desire, also, to see it clearly established, that he was not executed until crimes had been proved in evidence against him, which deserved death, and that the prompt infliction of capital punishment was necessary to rescue the colony from imminent danger, and from the horrors of a general or widespread insurrection, and the repetition elsewhere of such a slaughter of the white and coloured colonists, as had taken place in the eastern parts of the island." The scope of this letter, it is to be observed, was evidently not the mere legality of the trial and execution, as to which express proof of an actual intent would be unnecessary, and the prisoner would be answerable, criminally, for consequences his acts were calculated to produce (*vide ante*, p. 181). The scope of the letter was the propriety of the execution, waving any question as to its legality.

martial law, into the proclaimed district, for trial under martial law.

In a subsequent (*a*) dispatch, the Governor most clearly and succinctly stated the grounds on which he had declared martial law, and deemed its continuance necessary; and also what he deemed the true scope of martial law, viz., not the mere suppression of insurrection, but the subduing of a rebellion, the removal of danger, and the restoration of peace, security, and confidence, notwithstanding a great disparity and inadequacy of military force, by means of the terror inspired by prompt military movements, and swift and exemplary measures of military severity.

And in this despatch he pointed out (*b*) that such severity,

(*a*) "King's House, December 8, 1865.—Having been given to understand that some exception has been taken by a portion of the press of England (though I have not seen any portion of the articles referred to), to the steps taken by me to put down the rebellion in the eastern parishes, I think it due to you, as well as to myself, to make the following general statement:—Long previous to the rebellion breaking out in Morant Bay, Government had good reason to believe that a spirit of disaffection and disloyalty pervaded very many of the parishes; and as far back as August last, I had occasion to bring to your notice, that I had been obliged to send down a ship of war to certain parts, to watch events and be prepared for any emergency. The actual rising of the negro population took place at a different point of the island, and it rapidly extended from that point along the coast line of the eastern end of the island for some fifty miles, until headed and turned by the landing of troops at Port Antonio. It was also at the same time spreading to the north-west, up the line of the Blue Mountain Valley, until checked by meeting the troops detached from Newcastle to intercept its progress. It is scarcely necessary to point out that the negro is a creature of impulse and imitation, easily misled, very excitable, and a perfect fiend when under the influence of an excitement, which stirs up all the evil passions of a race little removed in many respects from absolute savages. Under these conditions, and knowing the insecure and unprotected state of the entire colony, and the small force available for our defence, in the event of any general rising taking place simultaneously, it became a matter of absolute necessity and self-defence, not only promptly to put down the outbreak, but by proclaiming martial law in the districts where it existed and contiguous thereto, to ensure that the punishment inflicted should be summary and severe. It was necessary to make an example which, by striking terror, might deter other districts from following the horrible example of St. Thomas in the East.

(*b*) In the long run, and viewed as a whole, any amount of just se-

in the long run, was humanity and mercy, since by that means only, under such circumstances, could a rebellion be suppressed, which if once allowed to get a head, would prove dreadful and formidable, if not fatal, and could only be suppressed, if at all, after a protracted and sanguinary struggle, and a loss of life, infinitely more terrible.

The Governor (*a*) in his answer to the despatches, con-

verity thus exercised became a mercy, and the exaction of the last penalty for rebellion from the few, has, in all human probability, saved the lives of the many, as well as relieved the colony and Great Britain from a long protracted, bloody, and expensive strife; for it must be remembered that in an extensive, thinly populated, and mountainous country like Jamaica, with out roads or means of traversing the mountain fastnesses, the subduing of a general rebellion would be no easy or short task. All the general arrangements, as narrated in my despatch, No. 251, of the 20th of October, were directed by myself personally, and for them I, alone am responsible. The subordinate arrangements and details with regard to the internal management of the districts under martial law, were of course in the hands of military authorities, whose reports, so far as they have reached me, I have duly transmitted to you. It is, perhaps, impossible, when a country is under martial law, imposed on account of scenes of violence, plundering of properties, burning of houses, and cruel butcheries, and when there is little time for that cool and careful investigation which takes place under more favourable circumstances, but that some occurrences must ensue which are to be deplored, and under which individuals may possibly suffer unjustly. But, taken as a whole, and bearing in mind both the vastness of the danger and the small means of meeting it, I do not consider that the punishment has been greater than the crime merited, or than was necessary to prevent a recurrence of it. I have a perfect conviction in my own mind, after an experience of four years in Jamaica, and with the best and most varied means of obtaining information, that this colony has had a most narrow escape from universal anarchy and tumult, and that this escape is due solely to the promptness and decision of action by which the first outbreak of rebellion was put down and punished."

(*a*) Despatch from Governor Eyre, dated Dec. 8, received Dec. 30.—"With regard to the various letters which accompanied my despatch and to certain passages in some of them, which you say call for further explanation and justification, I have to remark that, whilst all the general arrangements for the suppression and punishment of the rebellion were made under my own immediate direction, the subordinate details and the internal management of the districts under martial law, including the appointment of courts-martial, the trial of prisoners, the approval of sentences, and the carrying out of such sentences, vested entirely with the military authorities, were reported to the General in command, and only partially came

veying the demands for explanation, pointed out that, though the general arrangement for the suppression and punishment of the rebellion had been made under his own immediate direction, the subordinate details, and the internal management of the districts under martial law, rested entirely with the military authorities, were reported to the General in command, and only came under his notice in a general way, in letters and reports, which he had read hastily, under pressure of business; that it had been impossible for him to scrutinize details, and that he should have to call for explanations before he was in a position to offer any.

In this despatch (*a*), the Governor pointed out that

under my notice, in a general manner, through the letters to which you refer. Many of these letters I only obtained a hurried glance at, when overwhelmed with the labour and anxiety of the most pressing events; and although copies were eventually furnished to me, most of these only reached me just in time to be appended to my despatch, without my being enabled to have other copies made for my own use. After despatching the October mail, the thought, work, and anxiety entailed in arranging for the safety and protection of the Western districts of the Colony, absorbed my attention from a very early hour in the morning to a very late one at night; and even during the few brief hours that I attempted to obtain rest, there was rarely a night during which I was not called up at all hours, one, two, or three times, by expresses from one place or another, requiring me to get up at once and reply to or give directions connected with such communications. I mention these particulars only to show the pressure that was upon me (a pressure which has seriously affected my health), and how impossible it was for me to scrutinize or investigate carefully, the details of the enormous mass of papers, which were continually coming before me. As regards those connected with the rebellion, my desire was to place you in possession of the fullest and most complete information with the least possible delay, and in order to effect this, I was often obliged to transmit documents which had been but hastily glanced at, without analyzing or reporting upon them, and without retaining copies. I will now endeavour to procure such copies, and read through the correspondence, with the view of calling for fuller information upon such points as seem to require explanation or justification; but I should be obliged by your also causing me to be informed of the particulars in regard to which you desire further reports, so that nothing may be omitted, which it is in my power to do, to place all the circumstances in a clear manner before you."

(*a*) "It is very probable that some occurrences may have taken place

though it was impossible to prevent isolated acts, which might not be justifiable, yet, that the general character of the measures taken was not likely to be so, and that the reports of the officers in command of detachments were written in the field under great disadvantages, and could hardly be expected to contain all the details; but that, if all the circumstances under which they acted were known,

which cannot be justified during the prevalence of martial law, and where so much was necessarily left to the discretion of, or where an unforeseen responsibility was by circumstances forced upon, subordinate authorities, differing greatly in character, ability, temper, experience, and judgment. Such cases can only be sincerely deplored. It would have been impossible, under the excitement and urgency of the circumstances attending the outbreak, to have either guarded against or prevented their taking place. It must be remembered, too, that the threatening accounts received from the other districts of the Colony, and the limited means of meeting any difficulties which might arise there, made it a matter of simple self-defence, that the outbreak in the East should both be put down with the least possible delay, and be punished in the most summary manner. The safety, in fact, the preservation, of the whole Colony made this imperative. As regards the general features of, and mode of carrying out the retribution which was so necessarily and justly dealt to those who were principals in this most cruel and unprovoked insurrection, I do not doubt but that ample justification will be forthcoming by the officers under whose immediate directions and supervision it took place. The high rank and character of all these officers is, I think, a full guarantee that nothing improper or unjust took place with their knowledge or sanction; and I do not doubt but that they will be ready and able to afford full explanation and justification upon any points which, without such further information, may at present seem unsatisfactory. If I recollect aright, there was in one of Colonel Hobbs' own letters, a statement to the effect, that having some prisoners whom he could not take with him, he had found it necessary to shoot them. I presume this implies after trial by court-martial, and either upon their being taken in arms against the Queen, or upon direct testimony of their complicity in the rebellion. It must be remembered that the military officers in the field wrote under great disadvantages, and when worn out in body and mind by the fatigues and anxieties of the day. Under such conditions, their reports could scarcely be expected to contain all the details which it is desirable to know. With regard to Colonel Hobbs, there may also have been circumstances connected with his position, which made an immediate decision with regard to his prisoners essential; for I distinctly remember in another of his despatches, that he stated he was surrounded by thousands of rebels, that his position was very precarious, and that he required immediate reinforcements."

it would probably appear that they had a justification for all that had been done under their orders.

At this time, moreover, quite apart from those unauthentic representations by which alone, probably, no British Minister would have been influenced, the Secretary of State afterwards received (*a*) official reports through the

(*a*) "Extract of report from Lieutenant Adcock, to the Commander-in-Chief.—October 25.—I burnt seven houses in all, but did not even see a rebel during the day. On returning to Golden Grove in the evening, sixty-seven prisoners had been sent in by the Maroons. I disposed of as many as possible. On the 24th I started for Morant Bay, having first flogged four and hung six rebels. I did not meet a single man upon the road up to Leith Hall. There were a few prisoners here, all of whom I flogged, and proceeded to John's Town and Beckford. At the latter place I burnt seven houses and meeting-house, in the former four houses." (But see the rest of this despatch, *ante* p. 203). So, there was a report of Sir L. M'Clintock, dated 8th November, giving an account from the date of his arrival at Jamaica, on the 31st October, the day after the amnesty. —"The insurrection had been completely quelled. I am informed that no white people were assaulted subsequent to the *first fearful* outrage on the 11th ultimo; and the following day, at Golden Grove, about 300 persons had been hanged, and at least 800 were shot, chiefly by the Maroons, who entered with fierce zeal into the bush hunt after rebel negroes. On the 30th ultimo, Governor Eyre issued a proclamation, pronouncing a general amnesty to all those who submitted, excepting only persons implicated in the late murders. It is also announced that martial law is to cease on the 13th instant. Arrests are daily being made. The prisoners are generally sent to Morant Bay for trial, and a large proportion of them are hanged. It will be impossible ever to ascertain the actual loss of life, as great numbers were shot down by the Maroons in the woods; 1,500 lives would perhaps be a moderate computation." This report, on the face of it, was worth little or nothing, for it was the report of a naval officer on board ship, who could only write from vague rumour or hearsay, as to matters inland, with which he had no proper concern whatever, not having been—as Lieutenant de Horsey had been—actively engaged in suppressing the rebellion; and, indeed, it was a voluntary communication in an official form. Moreover, on the face of it, it was the result of gross and ridiculous exaggeration, or rather of fabrication, on the part of the actual informants, whoever they were, and turned out to be utterly untrue. Still it was sent as an official report, and could not be wholly disregarded, and it evidently made an impression upon the Secretary of State, and he wrote to the Governor upon it. "I have, however, been greatly concerned to find, in the enclosed despatch from Sir L. M'Clintock, the following statement:—

Secretary of War, from the Commander-in-Chief; and through the Admiralty, from the Naval Commander on the station, containing statements which appeared to him to afford serious ground for enquiry.

At the same time, the Secretary of State's attention was drawn to the publication of a letter from the officer who had commanded a detachment of volunteers or irregulars, purporting to give, what he called, "a *picture* of martial law," which, although not official, nor, so far as appeared, ever brought to the notice of the Governor, or even of the Military Commanders, was deemed to call for refutation or explanation (*a*).

'At least 800 were shot, chiefly by the Maroons, who entered with fierce zeal into the bush hunt after rebel negroes.' I have to request your immediate attention to this subject. I trust it will appear that Sir L. M'Clintock has been misinformed, and that an impression so unfavourable to the employment of the Maroons—an impression which I certainly should never have derived from your despatches and those to which I have above referred—will not turn out to have been well founded."

(*a*) Captain Ford, in command of the St. Thomas in the East Irregular Troops, wrote (in a private letter which got into the papers) as follows:—"On our march from Morant Bay we shot 2 prisoners, and catted 5 or 6 and released them, as these latter were only charged with being concerned in plundering, not murderers. This morning we made raid with 30 men, all mounted, and got back to head-quarters, bringing in a few prisoners, and having flogged 9 men and burned 3 negro houses, and then had a court-martial on the prisoners, who amounted to about 50 or 60. Several were flogged without court-martial, from a single examination. One man, John Anderson, a kind of parson and schoolmaster, got 50 lashes; 9 were convicted by court-martial; one of them to 100 lashes, which he got at once; the other eight to be hanged or shot; but it was then quite dark, so their execution was postponed till morning. We quarter on the enemy as much as possible; small stock, turkeys, &c., we take *ad libitum*; other supplies we give receipts for. We press all the horses and saddles we can find; but the black troops are more successful than ours in catching horses, nearly all of them are mounted. They shot about 160 people on their march from Port Antonio to Manchioneal, hanged 7 in Manchioneal, and shot 3 on their way here. This is a picture of martial law; the soldiers enjoy it, the inhabitants have to dread it; if they run on their approach, they are shot for running away. The contents of all the houses we have been in, except only this very house, but including the barracks, have been reduced to a mass of broken and hacked furniture, with doors and windows smashed by the

The official despatch from the Commander-in-Chief (*a*) to the Secretary of State for War (*b*), contained a serious charge against the Governor, of having "crowded the camps with political prisoners and rebels, captured in districts not under martial law, and whom the Governor desired to have tried by martial law," that is, as the Commander-in-Chief represented, illegally.

Upon these official representations, the Secretary of State addressed to the Governor another despatch, enclosing

rebels." This, perhaps, caused more sensation in the public mind than anything else, but the most serious statement in it "They" (*i. e*, the black troops) "shot about 160," &c., was obviously only written loosely upon hearsay, and turned out to be quite erroneous.

(*a*) Between whom and the Governor various differences had arisen.

(*b*) "Not only was the Up Park Camp, but Morant Bay, crowded with political prisoners and rebels, handed over by the civil authorities, captured in districts not under martial law, but whom the Governor and his Excellency's constitutional advisers desired might be tried by military courts-martial. Brigadier-General Nelson, entertaining some doubt as to the legality of this proceeding, called upon me for my opinion, which endorsed his own, that, although he might have the power and authority to try the prisoners, he would not be justified to bring them before a military court-martial, for political offences committed prior to the breaking out of the rebellion, attending or uttering treasonable language at seditious public meetings, their proceedings published and commented upon in newspapers, and whom the Government, either from weakness or mistaken lenity, did not at once arrest, thus operating as an indirect encouragement to the disaffected to persevere in their lawless designs." The statements in this despatch were greatly exaggerated, for besides Gordon, the head of the rebellion, only two or three persons were ordered by the Governor to be arrested out of the proclaimed district. It was, however, a serious thing for the Commander-in-Chief thus officially to charge the Governor with arrests and acts which he deemed of doubtful legality, especially, as at least one prisoner, the most important of all, had been executed, under circumstances similar to those he described, though apparently with the sanction and assent of the Commander-in-Chief himself, and though a distinction had been drawn by the General in command, between seditious words prior to the declaration of martial law, and incitement to the rebellion itself, the subject of martial law (*vide ante*, p. 174), that distinction was not adverted to in this report, and it was probably this letter which, more than anything else, impressed the Secretary of State's mind with doubts as to the legality of Gordon's trial.

them (*a*), and containing more specific and categorical demands for information as to the number of persons killed, either in the field or by sentence of court-martial, and under what circumstances, in each class of cases.

(*a*) "In reference not only to the particular reports adverted to in this and in my former despatch, but to the proceedings generally, I am desirous to point to the main topics which, in the opinion of Her Majesty's Government, demand your report:—1. The number of persons tried, and of those sentenced by courts-martial, specifying the charge and sentence, and whether or not the sentence was executed, and under whose authority, and whether minutes were taken of the evidence on which the sentence was founded in each case; all minutes of evidence so taken to be appended to the return. The return should show also at what places and times respectively the offences were charged to have been committed, and the accused persons were arrested or captured and tried, specifying in each case whether the offence was committed before or during martial law, whether the arrest or capture was made during martial law, and in a place to which martial law extended; and if the person accused was arrested or captured in a place to which martial law did not extend, and removed to a place to which it did extend, there to be tried by martial law, and for an offence not committed during and under martial law, it should be stated by whose authority this was done, and whether under the advice of the Attorney-General of Jamaica. 2. Whether any persons were hanged, flogged, or otherwise punished without trial, and if so, by whom and under whose authority in each case, specifying the name, sex, colour, and quality of the person punished, the nature and date of the punishment, the nature and date of the offence, and the grounds on which it was assumed to have been committed. 3. The number of persons, so far as can be ascertained, who were shot in the field or in the bush, their names, sex, quality, and colour, and whether adults or children, specifying in all cases whether they were resisting or flying, whether armed or unarmed, and if armed, with what weapons, whether such as are used only for the purposes of offence, or such as are used also in agricultural or other peaceful occupations. 4. Whether any and what oral or written instructions were given to officers in command of detachments sent in pursuit of rebels, whereby they might know on what evidences or appearances, other than hostile action or attitude, they were to assume that those whom they might meet with were rebels; and whether those officers, or any of them, were led by their instructions, or otherwise, and without authority induced, to assume that all persons flying or hiding from pursuit, or all persons found with plunder, or all persons leaving their labour on plantations, were to be regarded as rebels and shot when met with. Copies of all written instructions should be furnished." (Despatch Dec. 1.)

The Governor (*a*), on receiving these specific demands from the Secretary of State, could only forward them through the Commander-in-Chief to the Generals and Officers in command, in order to obtain their answers and explanations on matters as to which, of course, himself knew nothing; and this must necessarily have caused immense delay and inconvenience.

In a further letter (*b*) to the Commander-in-Chief, communicating the Secretary of State's demand for explanations

(*a*) "Governor Eyre to Major-General O'Connor.—December 13, 1865.—In reporting to Her Majesty's Government the occurrence of the late rebellion, I accompanied such report with copies of various letters received from the military and naval officers and others concerned in putting down and punishing the outbreak. Those letters were necessarily hurriedly written—brief and wanting in detail as to some of the circumstances which are mentioned as little more than bare facts. Her Majesty's Government do not doubt that, when time permits, the writers will be able to explain fully those proceedings to which the passages adverted to relate, and I am instructed to obtain the necessary particulars for their information. In accordance with these directions I propose, as the most convenient way, to send to you, in separate despatches, extracts from each letter received through you or Brigadier-General Nelson, containing any passages relative to which further information is required, so that they can at once be referred back to the writer, for such explanation as may enable Her Majesty's Government to justify the course taken. As the copies of most of these letters only reached me in time to append to my despatch, I was unable to retain copies for myself. I must, therefore, request your Excellency will be good enough to cause new copies to be made for me at as early a date as possible, to be paid for at the cost of the Colonial Government. I enclose a schedule of the letters of which I require additional copies."

(*b*) "In making these inquiries it is right to inform the officers that Her Majesty's Government does not do so as prejudging any person concerned in any proceeding, but for the purpose of eliciting information not given in the reports, but which it is believed will be forthcoming, and without which it is impossible to justify some of the transactions referred to, and which are only stated by the writers in so very brief, hurried, and incomplete a manner. In the meantime Her Majesty's Government relies upon the high character of all the officers, civil, military, and naval, who were engaged in suppressing the rebellion, and upon my assurance that the measures taken will prove to have been a merciful substitute for the much larger measure of punishment which would have had to be executed had the rebellion been allowed to gather head and extend itself. So many misrepresentations and exaggerations appear to have reached England and been credited, that public opinion naturally and necessarily requires that all the facts should

of the military reports, the Governor pointed out that the object of the Government was to obtain information not given in the reports, and without which it appeared impossible to justify some of the matters referred to, which were only stated in a hurried and incomplete manner; at the same time he alluded to misrepresentations which were circulated in England, and avowed that it must be expected that under martial law, some few occurrences would take place which could not be justified, but which, he believed, would turn out to have been unsanctioned by the military Commanders.

The Commander-in-Chief (*a*), when thus appealed to for

be plainly and fully stated, to correct the unfavourable impression which has been made upon a portion of the public at home; and I feel sure that when this is done, and it is borne in mind how great and imminent was the danger threatening the entire colony, and how small and inadequate were our means of meeting the emergency, full justice will be done to the valuable services rendered to the State by the officers under whose supervision the late rebellion was so ably and promptly put down. It must always be expected that during a time of active operations in the field, and especially when a country is under martial law, some few occurrences must take place which are to be regretted, and which are not accompanied by that strict formality which ought to be observed when practicable. Some cases of impropriety, and some acts of injustice, must always take place; but I trust it will be found that these have been as few as could reasonably have been hoped for, and have been unknown to, and unsanctioned by, those more immediately in command."

(*a*) "Major-General O'Connor to Governor Eyre.—Head-Quarters, Dec. 24, 1865.—I had the honour to receive, at 8 o'clock last night, your Excellency's despatch of the 23rd December, with extracts of despatches from the Secretary of State for the Colonies, transmitting portions of reports of the officers engaged in suppressing the late rebellion, and requiring explanations and justification. No time shall be lost by me in obtaining the required information; but as Colonel Hobbs and Lieutenant Adcock, of the 2nd Battalion of the 6th Royal Regiment, are at Newcastle, and Captain Hole, of the same corps at Port Antonio, I cannot communicate with them and receive replies for the mail closing to-day. I know nothing of Captain Ford, St. Thomas in the East Irregular Troop, nor does he belong to the forces under my command. I hesitate not to say that Her Majesty's Government may rely on the high character of the officers, military and naval, engaged in suppressing the rebellion, and upon the assurance of your Excellency that the measures taken will prove to have been a merciful substitute for the much larger measure of punishment which must have been

information, could only refer to the officers who had commanded detachments, and in the meantime declared his firm belief that it would be found that no officers under his command had sanctioned or directed any severities not justified by military usage, or the exigencies of the service.

In consequence of statements made in denial of the right to declare martial law, the Governor (*a*) wrote a despatch

executed, had the rebellion been allowed to gather head and extend itself. As regards the statement conveyed in Sir Leopold M'Clintock's official despatch to the Admiralty, 'that at least 800 were shot chiefly by the Maroons,' I never heard a faint rumour to this effect, and I entertain such confidence in the experience, discretion, and humanity of Colonel Fyfe, that I am convinced the Maroons, under his immediate command, could not have perpetrated such atrocities with impunity."

(*a*) "Governor Eyre to Secretary Cardwell, dated December 20, 1865.—Having noticed, in some of the English papers, that the late serious outbreak in this colony has been designated as a local riot stimulated by the circumstances of the moment, and that no outrages took place until after the people had been fired upon by the volunteers, I have the honour to inclose a statement which I have received from the Honourable H. Westmorland, showing that the belief that a rebellion was about to break out was entertained and made known to him a fortnight before it took place, though he then discredited and ridiculed such a supposed contingency. There can be no question but that for months prior to the rising in St. Thomas in the East, there were uneasy feelings, and vague apprehensions entertained by persons having opportunities of seeing or hearing much of the labouring classes as to the intentions of the negro population, not particularly in the eastern districts, but throughout the island generally. With regard to the predetermined intentions of the rebels at Morant Bay, it is sufficient to state that, prior to their making their appearance before the court-house, or coming into collision with any one, they had sacked the police-station, and carried off all the arms and ammunition. Many indications have also come under my notice, evidencing that persons at a distance from the scene had a general knowledge beforehand of what was about to take place. Nor was the rising confined to the inhabitants of Morant Bay. It spread from district to district with great rapidity, until stopped by meeting the military, who were landed at Port Antonio in advance of the rebellion, and marched back to Long Bay, where they met the movement, and prevented its further progress. It was not the Morant Bay people who went from district to district, but the negroes of each district, who rose as the wave of rebellion advanced towards them." And, writing at the time to the Commander-in-Chief, he said (October 14, Parl. Pap., Part 2, p. 5):—"We are working hard, and endeavouring to hem in the insurgents. . . . . We shall proceed to Port Antonio (forty miles dis-

to the Secretary of State, setting forth succinctly the grounds on which he had come to the conclusion, that it was not a case of mere local, or casual riot, but the outbreak of a general rebellion, or of a rebellion which, if not speedily crushed, would speedily become general, and prove formidable, if not fatal.

After thus requiring, through the Commander-in-Chief, from the military officers who had been engaged in carrying out martial law, the explanations demanded by the Secretary of State, the Governor wrote (*a*) a despatch to the Secretary of State, informing him of the measures he had thus adopted for the purpose of obtaining the information demanded, and pointed out the delay which must necessarily interpose before it could be obtained.

tant), where the bulk of the insurgents are. We shall, I hope, be able to get the rebellion under; but within a given area it is general, and the massacres have been horrible." And in the above despatch he enclosed a statement by a respectable witness to Mr. Westmorland, to the effect that, from what he heard the blacks say two weeks before the outbreak, he feared that a rebellion was about to break out. (Parl. Pap., part 2, p. 8.)

(*a*) "Governor Eyre's despatch, 23rd December.—The packet being a day behind time, and yesterday having been absorbed in attending to matters connected with the Legislature, which it had been previously arranged I should then close, I am unable to do more than barely acknowledge the receipt of your communications, and state that I will lose no time in endeavouring to collect and forward to you, so far as it is procurable, the information asked for in the above despatches. Much of it is, however, necessarily unattainable, as I understand that at drumhead courts-martial it is never usual to keep any records of evidence, and the case of G. W. Gordon is, I believe, exceptional in this respect. All the officers whose reports require explanation were under the immediate orders of General O'Connor, to whom those reports were forwarded. I have this day written to General O'Connor a despatch, of which I inclose a copy, forwarding extracts of your despatches, and from the inclosures accompanying them, and I have requested the General will take such steps as are necessary to procure the required information from the officers referred to, with the least possible delay. As the various officers who were in command of detachments during the rebellion are now more or less scattered, it is possible that some delay may take place, &c." Before this despatch was written, the Secretary of State had resolved, no doubt a good deal upon this consideration of delay, to issue a Royal Commission of Enquiry.

In this despatch (*a*) the Governor reminded the Secretary of State that, during the rebellion there was no time to examine critically the hurried reports which were submitted to him for a very hasty perusal, and he had no reason for supposing that any unjustifiable acts were being committed; that he could not himself pretend to have acted strictly within the trammels of law, which no man could under such circumstances; but that he believed he was able to justify himself fully, and that, though he did not doubt that some acts of wrong might have been committed, he believed they were not sanctioned by the military Commanders, who had to act under circumstances of pressing emergency.

In this despatch (*b*) the Governor, while admitting that

(*a*) Despatch, December 23rd. In this despatch he wrote:—"That improprieties or acts of wrong have been committed during the existence of martial law, I do not doubt. It was only to be expected this should be so, but I trust it will be found eventually that these instances have been comparatively few, and have either been unknown to, and unsanctioned by, the officers immediately in command, or have taken place under the pressure of circumstances which, if not justifying, may at least in some degree palliate the irregularities committed. In reviewing the acts of the military and naval authorities in dealing with any rebels who were found in arms, or in summarily disposing (after trial by court-martial) of those who were taken prisoners, it is necessary to bear in mind that there were no prisons or jails to which to send prisoners, and that some 500 men were engaged in quelling a rebellion in districts (St. David, St. Thomas in the East, and Portland) tenanted by a population of some 40,000, and comprising upwards of 500 square miles of country. Nor must it be forgotten that nearly the whole of the population, if not in actual rebellion, was sympathising with the rebels, and taking no steps to arrest its progress, or aid the authorities. It was impossible, under such circumstances, that they could either take charge of and guard any large number of prisoners, or make long delays to institute more formal trials. The administration of summary justice became a necessity, and any hesitation would have been fatal to the success of the military operations. Whilst regretting the necessity of, and deploring the evils unavoidably resulting from, such a course of action, I do not see how it could have been avoided."

(*b*) "No doubt the tone and terms used in some of the reports by officers engaged in the field are not such as could have been wished, considering the grave events to which they relate; but great allowances must be made for the circumstances under which these reports were written, when

the tone and language of military reports, written under such circumstances, might, in some instances, have been questionable, urged it was hard that brave soldiers, who had saved a colony, should be on that account misrepresented, and held up to odium; and he expressed his firm belief that they would be able to justify any acts which might appear of a doubtful character.

In one instance (*a*) only, was the Governor able at once to

harassed and worn out by the duties and anxieties of the day, and whilst the minds of the writers were still freshly impressed with the atrocious occurrences which had then so recently taken place, and which might again occur, in other districts, at any moment. But it is very hard that our soldiers and sailors, whose courage, zeal, and exertions have been the saving of Jamaica, should be so misrepresented and traduced, as I see they are by a large section of their countrymen at home, who know nothing of the dangers or difficulties which had to be surmounted, or of the pressing necessity which existed for the most prompt and decisive action. I have now only to thank you for the confidence you have been pleased to express, pending further information, in my own character, and in that of the military and naval officers concerned. As regards myself, I rest upon the conviction that I did my duty faithfully, in not shrinking from undertaking a responsibility which few men would have accepted, and in doing which I was quite aware of what the consequences would be, so far as regards misrepresentations and vituperation on the part of a very powerful party at home, but which action on my part I believed to be, and still believe to have been, essential to the preservation of Jamaica. I do not pretend to have acted within the strict trammels of the law—no man could under such circumstances; but I do not doubt being able to justify myself fully to Her Majesty's Government, and those who are willing to take an unprejudiced view of all the circumstances and events. As regards the military and naval officers, I feel assured that they will be able fully to explain and justify occurrences which, from being insufficiently narrated at present, may appear to be of a somewhat doubtful character; and if in some of the details unavoidable irregularities or improprieties have occurred, the general nature of the operations will be found to have been just and necessary, and consistent with the high character so deservedly enjoyed throughout the world by British soldiers and sailors."

(*a*) "Postscript to Governor Eyre's Despatch, 23rd December:—P.S. Sunday, 24th December.—Since writing this dispatch I have received an express from the Admiral, containing Sir L. M'Clintock's explanation. You will be glad to learn that his opinion rested on no better grounds than mere rumours or unauthenticated reports, and newspaper statements. I trust this instance will show how little to be depended upon information or opinions are when expressed by persons not having the opportunity of personal

obtain from the officer implicated, immediate and explicit refutation of the accusation made against the force he had commanded; an irregular force which had been, in the opinion of the military Commanders, mainly instrumental in suppressing the rebellion and capturing the ring-leaders, but who had been accused of wholesale massacre. And the refutation of this charge was conclusive.

The explanation afforded by the officer, moreover, was of general importance, as illustrating one of the unavoidable necessities of martial law, which might lead to some instances of unknown and unlicensed excess.

The Secretary of State had observed, as to a corps of Irregulars (*a*) who had been employed, that "the Colonel

knowledge, or of referring to authentic reports, and when the grounds are not given upon which such information or opinions rest. . . . ." The Governor enclosed a letter to the Commander-in-Chief about it:—"With regard to the opinion, as to the conduct of the Maroons, expressed in Sir L. M'Clintock's official despatch to the Admiralty, I may remark that I have called upon Colonel Fyle to report upon the conduct of the Maroons, and that I understand from him, at a personal interview yesterday, that so far from Sir Leopold M'Clintock's impression being correct that 'at least 800 were shot, chiefly by the Maroons,' he believes that not more than 25 were so shot, and many of these in a skirmish with the rebels, in which one of the Maroons was wounded. I shall, however, be obliged by your also affording me any reports or information you may have, or be able to procure, on this subject; certainly, I myself never heard even a rumour to the effect stated by Sir Leopold M'Clintock, until I saw it in that officer's official report." The Commander-in-Chief quite concurred in this; and he enclosed a letter from Colonel Fyfe, to the effect that only 25 rebels were killed by the Maroons, of whom 10 were killed in the field in an encounter, and 5 by sentence of court-martial, and one shot with the ring of one of the victims of the massacre on his finger.

(*a*) The Maroons. Colonel Fyfe, their Commander, wrote this reply: – "The rebels had sacked every house, store, and shop, within an area of 30 miles by 12, embracing the town of Bath, and extending from the confines of the parish of Port Royal, to the mouth of the Plantain Garden River, in St. Thomas in the East. Every article coveted and of easy transport was carried off, whilst all others were destroyed, the floors of the rooms exhibiting one indiscriminate mass of books, private papers, smashed looking-glasses and glass ware, broken tables and chairs, mattrass hair (for even the ticking was ripped off), and every article of household furniture. The plunder was either carried by the rebels to their houses, or hidden in the

was the only officer mentioned as being employed with the force, whilst divers parties of them appear to have been out in various directions out of the immediate control of the Colonel;" and he naturally asked, "was there any, and what control exercised over the operations of those parties; and what was it expected the nature of those operations would be, and of what nature, in point of fact, did those operations prove to be?" It happened that the Colonel in command of this force was the only one of the officers in command of detachments, who was able at once to afford an answer, which he did, to the effect that he had given orders "never to injure a woman or child, nor to kill a man who surrendered," and that he had no reason to think his orders had been disobeyed. That he could not help sometimes sending out detached parties, but always under officers of their own.

Before, however, the despatch enclosing their explanations was even written, (and it would be nearly a month longer before it could be received), a strong feeling had arisen, from a concurrence of causes (*a*); that even if the

bush; and as the names of the parties committing these excesses were known (for, under the expectation of acquiring the country, they had spared the women for ulterior ends), the duty of the Maroons was to scour the whole of the above district, for the purpose of capturing these parties, and of recovering the plunder. It is quite true that I was the only white officer employed with the Maroons, and that, although I always accompanied the main body, I had, in carrying out the above operations necessarily to detach parties in different directions, and beyond my immediate observations; but these parties were always commanded by one of their own officers, who acted under these specific instructions, namely:—'Never injure nor insult a woman or a child, nor kill a man who surrenders.' And I would ask whether it was not as safe to have detached parties of the above kind, which with some slight allowance for the licence inseparable from the existence of martial law, and the feelings necessarily engendered by the atrocities committed by the rebels, would obey those instructions in all important points, as to send those parties in charge of other officers of another colour, invested with discretionary powers of action."

(*a*) The Governor, in his despatches, had levelled attacks at a powerful religious body, as in some degree morally responsible for the rebellion. (*Vide ante*, p. 200). And this had excited their hostility. Then there was

declaration of martial law had been originally justified, it had been continued much longer than necessary, and carried out with unnecessary severity ; and though, to some extent, this feeling was evidently, as already has been shown, based on misrepresentation of the fact (*a*), and was also partly based on misconception of the law as to the real scope of martial law, representations had been urged with great force upon the Secretary of State, to pronounce a censure, or to institute an enquiry.

As to the continuance of martial law (*b*), the charge against the Governor, for continuing it unnecessarily, was mainly based upon some passages in his dispatch, announcing that the rebellion was checked, headed, or hemmed in, and was crushed, in the district first disturbed ; but the same dispatch stated that there was widespread disaffection, and a general dread of the renewal of the rebellion, and, in point of fact, acts of rebellion continued.

The misconception of the law which, coupled with the

the feeling,—natural among people who live under ordinary law—adverse to martial law. Then there were the grossly exaggerated accounts of its severities.

(*a*) It was denied that there had been a rebellion: but only a mere local riot. It was declared that the insurrection, even if there had been one, was over in three days. It was stated that 2,000 negroes were executed, and that their dead bodies were strewed over a space of eight miles, &c., &c. These misrepresentations, gross as they were, would be countenanced and excused by Sir L. Clintock's letter, of which the refutation did not arrive till long afterwards.

(*b*) "The Governor stated in his address to the Colonial Legislature, within three days from the time of the first intelligence of the rebellion, it was checked, and headed, and hemmed in ; and within a week it was fairly crushed, and arrangements made for securing and punishing the rebels who had not yet been made amenable." "In his dispatch to the Colonial Secretary, October 20, the rebellion having broken out on the 11th, and martial law having been proclaimed on the 13th, he wrote : "Within three days the rebellion was checked within the disturbed district ; within a week it was suppressed (*vide ante*)." But it was plain, from the context, that he spoke of actual insurrection, and that there was still a great dread and danger of a renewal of it, arising from a widespread state of rebellion. And, moreover, at that very time, though he did not know it, acts of armed insurrection were continuing (*vide ante*).

misconceptions as to the facts, formed the basis of the representations which were made to the Secretary of State, was founded upon an erroneous view of the law, supported by a legal opinion (*a*), which had been obtained and published, to the effect that the scope of martial law is only the repression of actual *insurrection*, so that any executions under martial law, after the actual insurrection, or active resistance, had ceased, would be beyond its scope, and so be unjustifiable.

So long as these representations were made upon mere hearsay, or unauthenticated statements, and so far as they

(*a*) "Martial law is the assumption, by the officers of the Crown, of the absolute power exercised by military force, for the suppression of insurrection, and the restoration of order and lawful authority. The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose; but they are not justified in the use of excessive or cruel means, and are liable, civilly or criminally, for such excesses. They are not justified in inflicting punishments after resistance is suppressed, and after the ordinary courts of justice can be reopened. Courts-martial, by which martial law, in this sense of the word, is administered, are not properly speaking, courts-martial, or courts at all, and are mere committees, formed for the purpose of carrying into execution that discretionary power assumed by the Government." It will be seen that this opinion applies to the *common law* power of the military to resist or repress actual insurrection or riot (sometimes called martial law), not the power, which can only be assumed by the Crown, of declaring, and acting on, a *state of war*, and extending to the population, in a *state of rebellion*, the rigour of military law. That power, however, can only be exercised when there is a *rebellion*, and a levying of war against the Crown. (*Vide ante*, Part I.). Now, this opinion was written just after the publication of the first despatch received from the Governor, which, it was thought by some, did not disclose sufficient facts to show that there had been such a rebellion. And there can be no doubt that the case laid before the eminent counsel who signed this opinion, strongly represented that there had *not* been such a rebellion. Consequently (as an opinion is always written with reference to the case submitted), it was not necessary for them to enter fully into the nature of martial law in its strict sense, but only in its secondary sense, of the function of the military acting in aid of the civil power. And they very carefully added, that they could not say that there might *not* be facts which would justify the measures which had been taken; though, at the time, they could not see that there were such facts.

were addressed to objects of public agitation, they would probably not have been regarded by the Secretary of State, as they were not only libellous, but constituted a serious indictable offence (*a*), because tending to pervert the public justice of the country, supposing the parties attacked were, as it was presumed they were, criminally liable for their acts.

Assuming, as the assailants did assume, that the Governor and the military Commanders or Officers would be criminally *liable* (as certainly they would be *triable* here, in this country, supposing them to be so *liable*), then the publication of such accusations against them, as must necessarily tend to prejudice the public mind against them (*b*) here,

(*a*) "Whether the statements were true or not, for, by putting the public into possession of the facts before the period at which the party is to be put upon his trial, such a prejudice in the public mind may be created, as to make it impossible, when the party is afterwards put upon his trial, to select a jury whom that prejudice has not reached. The law of England is anxious for the interests of persons against whom charges may be made. If a man commits a crime, there is a legal and constitutional mode by which that crime may be brought into discussion. He is liable to be tried; but though his crime may be as great and as aggravated as possible, he ought to have a full, fair, and dispassionate investigation of his conduct at the time of his trial. In this case the libel imputes that which would be murder, and it charges, not any particular individual, but a body at large, with the crime. It is impossible to read this, even although he may not be able to fix on any of the persons constituting the body, so that if afterwards they were indicted, a prejudice would be excited against them." (Bayley, J., *The King* v. *Burdett*, 4 B. & Ald. 324.)

(*b*) "It would be a great obstruction to public justice, and a great stigma on the administration of justice in this country, if, in a collateral way, in a transaction in which the public mind may happen to be interested, any person, by a voluntary publication on his part, should be at liberty to raise the question, whether particular individuals had or had not been guilty of particular crimes? instead of doing so in a constitutional mode, by pressing forward the charge against those individuals openly, and giving them a fair opportunity of defending themselves against the accusation (Bayley J., *The King* v. *Burdett*, 4 B. & Ald. 325). And the Judges were careful to point out especially that this was so, whether the statements were true or false. And Sir Francis Burdett, for sending such statements to the newspapers, was fined £2000, and imprisoned for several months.

where, if at all, they would be triable, was, undoubtedly, a grievous offence against justice, and an indictable offence.

And although, no doubt (*a*), representations sent honestly, however erroneously, to the Secretary of State, in the view of obtaining a recall of the Governor, or an enquiry into his conduct, or some other action as a Minister, would be privileged and protected by law, it would be otherwise of mere voluntary speeches at public meetings, or the publication of partisan appeals or speeches, whether at meetings or deputations.

The Secretary of State (*b*), being a direct adviser of the

(*a*) Applications to the Secretary of State for redress are, when honestly made, privileged, even though defamatory, provided he is the competent authority to grant redress, or were honestly, though erroneously supposed to be so (*Fairman* v. *Ives*, 5 B. & Ad. 642. *Blagg* v. *Sturt*, 10 Queen's Bench Rep. 905, per Lord Denman, C. J.) But expressions of enmity or hostility would take away the protection (*Ibid.* p. 907, per Wilde, C. J.,) in a court of error. Thus, in the famous Greenwich Hospital case, where Capt. Baillie had presented memorials, reflecting on Lord Sandwich, to the Directors and the Governors of the hospital, and the Lords of the Admiralty; the court discharged a rule for a criminal information, without nicely considering whether he could fully substantiate all that he had alleged, or what remedy could be afforded to him by those to whom he appealed, being convinced that he had *bonâ fide* complained of a grievance, and *bonâ fide* sought redress (*Rex.* v. *Baillie*, 21 Howell's State Trials, 1).

(*b*) The office of Secretary of State is one of very ancient date. He was, in fact, the ordinary channel of communication between the Sovereign and the subject. The duties of the office were discharged by a single person, then there were two, since then, until very lately, there were three, having separate departments, the Home, the Foreign, and the Colonial. A memorial to the Secretary of State is virtually a communication to the Queen, through her Secretary of State, and it cannot be doubted that Her Majesty has an interest in the matter, for she is to see that all in authority under her do their duty, and that justice is duly administered to all her subjects. There can be no doubt that a *bonâ fide* petition to the Queen for the removal of a magistrate, by an aggrieved person, living under his jurisdiction, would be a privileged communication. Her Majesty might direct an enquiry to be made into the conduct of the magistrate, and a memorial to the Secretary of State, praying him to enquire, and to recommend to Her Majesty that the party be removed, is equivalent to such a petition. Her Majesty could not personally make the enquiry, and upon a petition to the Queen, Her Majesty might direct the enquiry to be made. (Per Lord Campbell, C. J., *Harrison* v. *Bush*, 5 Ellis and Blackstone's reports).

Crown, and the constitutional channel for applications to the Crown for redress, communications honestly made to him, being, in substance, representations by the subject to the Sovereign, would be protected by the law, on the same principle as that upon which the Secretary of State cannot be sued for advice he may give to the Crown (*a*), that being within his function and his duty, however he may be liable for acts wholly illegal and beyond his functions.

The Commission was, in short, a species of court of enquiry (*b*), a kind of investigation which, for upwards of a century, the Crown has been accustomed to institute, not with any judicial character, but for the *purpose of informing its own conscience* as to the conduct of its officers in public and military capacities, in cases where it does not appear that there are sufficient grounds for courts-martial or for any criminal proceeding.

And upon this principle, it was perfectly constitutional for the Secretary of State, upon considerations, on the one

(*a*) (See *Irwin* v. *Sir George Grey*, Common Bench Reports, 19 N. S. 585). The Secretary of State held not liable for advice given to the Crown.

(*b*) The Commissions of officers are held at pleasure, and the Sovereign, by his prerogative, has the right of appointing what is called a court of enquiry (*vide* Sir John Mordaunt's case, Sir John Mander's case, and Lord Torrington's case—M'Arthur on Court-martial, vol. i. p. 109, in 4th Edition). And military law recognises all disorders and neglect, which officers and soldiers may be guilty of, though not specified in the Articles of War (Williams' Military Law, 148). In cases of this kind the Commander-in-Chief may direct a court of enquiry, instead of a court-martial; or the Secretary of State, a commission of enquiry, which, instead of being the exercise of an act of severity, is very frequently an act of tenderness to the party (Dallas, C. J., *Home* v. *Lord Bentinck*, 2 Brod. & Bing. rep. 160). The proceeding is, therefore, in its very nature, a proceeding by the Commander-in-Chief (or Secretary of State), for the purpose of obtaining that information, which he is bound to obtain, as to the conduct of every officer holding a commission in the Army, in furtherance of the exercise of his public duty, upon the result of such enquiry, whether the enquiry is to cease in the first instance, or whether it is to lead to any ulterior measure. *Ibid.* The report, is in its nature, a confidential communication, in consequence of a direction by him, *for the information of his own conscience* in the *exercise of his public duty* (*Ibid* 163).

hand, of a demand for enquiry (*a*), based in a great degree upon official and authentic statements (*b*), and, on the other hand, considerations of obvious practical convenience (*c*), to advise the Crown, as he accordingly did, to institute an enquiry, to inform its conscience as to the conduct of its own officers, in the only way in which, practically, such an enquiry could be instituted, namely, by means of a Royal Commission.

As the charges against the Governor almost assumed an official form, and appeared to be in some degree supported by the Commander-in-Chief and the Naval Commander, and as time was necessarily lost in communications, backwards and forwards, between the Secretary of State and the Governor of a colony, at such a distance, it was determined (*d*), in

(*a*) *Vide ante*, p. 240.

(*b*) *Vide ante*, p. 241.

(*c*) Already, just two months had elapsed since the declaration of martial law, and one month since its cessation, and nearly a month was consumed in the transmission of each despatch, so that almost two months intervened before an answer could be received, and it was manifest that months must interpose before the explanations of the military officers could be received.

(*d*) The Right Hon. Edward Cardwell, M.P., to Governor Eyre. Downing Street, December 16, 1865.—"In former despatches respecting the recent troubles in Jamaica, I have called your attention to many important matters on which Her Majesty's Government have desired to be furnished with the fullest information. I have now to state to you that, after taking the case, so far as they are at present acquainted with it, into their mature consideration, they have determined that, in order to the complete investigation of the subject, and in justice to yourself and to all parties, it is right to institute in the island a full and independent enquiry. The enquiry will embrace the origin, nature, and circumstances of the troubles, and the measures taken in the course of their repression. This determination has rendered it necessary to consider in what manner the Government of Jamaica ought to be administered during the enquiry. That the peace of the colony may not be disturbed by the means taken for collecting information, and in order also that the investigation may be effective and satisfactory, it seems to Her Majesty's Government that the supreme authority in the colony, military as well as civil, must for the time be vested in the officer who is to preside over the Commission. This must evidently be an officer who has himself borne no part in the proceedings, and whose reputation will be a sufficient guarantee to yourself, and to all whose conduct or whose grievances may in any way come under review, for the perfect fairness and

order to a complete investigation of the subject, and in justice to the Governor and all parties, to institute, in the island itself, a full and independent enquiry, with a view to satisfy the Government as to the truth on these conflicting official statements, and, in the meantime, as a necessary incident of it, to suspend the Governor.

The object and scope of the enquiry were clearly and concisely indicated by the Secretary of State in his letter (*a*)

impartiality of the enquiry. As he must combine the military with the civil authority, he must be a soldier. It is very desirable also, upon other grounds, that the government should, for a time, be administered by a soldier, in order to secure unity of view and action in the military precautions, which will be necessary to guard the colony against the possible risk of further outbreak. For these reasons we have selected Lieutenant-General Sir H. Storks, G.C.B., at present Governor and Commander of Her Majesty's forces at Malta, and have requested him to proceed at once to Jamaica, to carry these intentions into effect. In conclusion, I will only repeat, on the part of Her Majesty's Government, that while we feel it to be our imperative duty to institute this enquiry, we desire by every means in our power to guard against in any way prejudging the result. Our earnest hope is that the result will be to satisfy us on the points on which it is necessary for us to be satisfied.

(*a*) "The Right Hon. Edward Cardwell, M.P., to Governor Sir H. K. Storks.—December 16, 1865.—You have received your temporary Commission as Governor of Jamaica. It is the intention of Her Majesty's Government that you should proceed forthwith to that island, holding for a time not only the office of Governor, but also the supreme military command, and the office of President of a Royal Commission, which will shortly be appointed to enquire into the origin, nature, and circumstances of the recent disturbances, and into the measures taken in the course of their repression. I inclose, for your information, copies of despatches which have been addressed to Governor Eyre since the commencement of these troubles, in order that you may be aware what information Her Majesty's Government have desired to receive from the Governor of Jamaica. Governor Eyre will now be relieved from any further obligation of replying to those despatches, and the task of investigating the subject will devolve upon you, and upon the Commission over which you will preside. The Royal Commission and Instructions will be issued with the least possible delay. It will be sufficient to say now that Her Majesty's Government desire that the enquiry shall be full, searching, and impartial. You will, I conceive, require statutory powers to enable you to collect the necessary information, and these powers I do not doubt the Legislature of Jamaica will readily confer upon you. By entrusting to you these important duties, Her Majesty's Government evince their confidence in your ability to deal with a

to the Head Commissioner, on the occasion of his appointment, and were declared distinctly to be to "enquire into the origin, nature, and circumstances of the recent disturbance, and into the measures taken in the course of their repression;" the basis of the enquiry being also stated to be the despatches already addressed to the Governor, containing the demands for information required by Her Majesty's Government.

That is to say, the scope and object of the enquiry were declared to be, to inform the conscience of the Crown, and, in fact, to be a more convenient and effective and speedy substitute for a dilatory process of enquiry by communications between the Secretary of State and the Governor at such a distance. And the same object was declared in the Commission (*a*) to the officer appointed to supersede the

subject so painful and difficult. "Their first anxiety has been that security should be restored to all, of whatever race or colour, who desire to live in peace and orderly submission to the law, and that any further sacrifice of life, by the renewal of these disturbances, should be effectually prevented. Those objects attained, they desire to investigate calmly, thoroughly, and impartially, the origin, nature, and circumstances of these lamentable events, and with full information before them to arrive at a deliberate and a just decision upon the whole case.

(*a*) The Commission recited:—"And whereas it is alleged that great disaffection hath prevailed in our said island, and that sundry evil-disposed persons have concerted the destruction of other our subjects resident therein: And whereas grievous disturbances have broken out in our said island, and have been suppressed, and the said disturbances and suppression have been attended with great loss of life, and it is alleged that excessive and unlawful severity has been used in such suppression: And *whereas it greatly concerns us that* full and impartial enquiry should be made into the origin, nature, and circumstances of the said disturbances, and with respect to the measures adopted for the suppression of the same: And whereas it may be advisable that the said Edward John Eyre should be present in our said island during the whole or part of the said enquiry; but it is requisite for the sufficiency of the said enquiry that the powers vested in him as Governor of our said island should not be exercised by him while so present therein, but should, during the prosecution of the said enquiry, and for such further time as may seem to us requisite, be vested in such other person as we may think fit. Now know you that we have revoked and determined," &c.

Governor in his office, pending the enquiry; and which declared that it *concerned the Crown* that the enquiry should be made, as it obviously did.

So also in the recitals (*a*) and terms of the Royal Commission of Enquiry itself, it was distinctly declared, as its ground and basis, that it concerned the Crown that the enquiry should be made into the origin, nature, and circumstances of the disturbances, and the means adopted in the course of the suppression, and the conduct of those concerned either in the disturbances or repression, and

(*a*) "Whereas it is alleged that great disaffection hath prevailed in our said island, and that sundry evil-disposed persons have concerted the destruction of other our subjects resident therein: And whereas grievous disturbances have broken out in our said island, and have been suppressed, and the said disturbances and suppression have been attended with great loss of life, and it is alleged that excessive and unlawful severity has been used in the course of such suppression: And whereas it greatly concerns us that full and impartial enquiry should be made into the origin, nature, and circumstances of the said disturbances, and with respect to the measures adopted in the course of their suppression: And whereas it is requisite, for the sufficiency of the said enquiry, that it should be conducted by persons not having borne part in the government of our said island during the existence of the said disturbances, nor in the suppression thereof. Now know ye that we, reposing especial trust and confidence in the loyalty and fidelity of you, the said Sir Henry Knight Storks, Russell Gurney, and John Blossett Maule, have constituted and appointed you to be our Commissioners, for the purpose of making such inquiry as aforesaid; and we do authorize and require you, with all convenient dispatch, and by all lawful ways and means, to enter upon such enquiry, and, jointly or severally, to collect evidence in our said island respecting the origin, nature, and circumstances of the said disturbances, and respecting the means adopted in the course of the suppression of the same, and respecting the conduct of those concerned in such disturbances or suppression, and we do require you to communicate to us, through one of our principal Secretaries of State, as well as the said evidence, as any opinions which you may think fit to express thereupon. And we do further require that you do in all things conform to such instructions as shall be addressed to you by us through one of our principal Secretaries of State: And we do strictly charge and command all our officers, civil and military, and all our faithful subjects, and all others inhabiting the said island, and the territories depending thereon, that in their several places, and according to their respective powers and opportunities, they be aiding to you in the execution of this our commission. And for so doing, this shall be your warrant."

it directed the Commission to report to the Crown the evidence, and their opinions thereon.

The Commission raised most important constitutional questions, as to the proper and legitimate scope of its powers, whether as to enquiry or opinion.

In judging of the scope of the enquiry, it would be necessary to consider, not merely the terms of the Commission, including its recitals (*a*), but also the legal or constitutional principles which limit the power of the Crown to *issue* commissions of enquiry for the information of its own conscience (*b*). And it is important to consider this, because upon this would depend the weight or authority which would attach to any expression of opinion.

Looking to the preamble and the recitals, as well as to the terms of the Commission, in the light of well-known legal and constitutional principles, it would appear (*c*) that

(*a*) Which may, according to well-known principles, limit the construction of the operative parts of any document, as regards general terms, which must have some limitation, to make them legal or rational.

(*b*) For, according to another well-known principle, the construction of any document depends, not merely on its terms, but on those legal principles which must limit it, so far as they affect the legal power of the party or authority issuing it. No one could contend that the Crown has an arbitrary power to issue commissions, with any powers it pleases. On the contrary, there is nothing more jealously guarded, either by constitutional principle or by prescription, than the power of the Crown to issue commissions. Thus it was that the Petition of Right condemned commissions of martial law in time of peace. (*Vide ante*, p. 10.) Thus it is that new courts cannot be created by commission, but commissions of that kind are limited by prescription.

(*c*) No one could contend that it would be competent to the Crown to issue an extraordinary commission, in the nature of an inquisition, which would necessarily be of the nature of a fishing inquisition, into matters criminal. There is nothing the law so abhors, even in civil matters, as *fishing* inquisitions or enquiries, in matters which are or may be subjects of *judicial* decision. Hence, it is a well-settled and general principle, even of our civil jurisprudence, whether at law or equity, that anything in the nature of inspection, inquisition, or interrogation, into matters which may affect civil rights, shall not be allowed until there is a legal suit, and it is shown that the party has a right to the evidence. The phrase "fishing bill" is well known in equity, and the phrase "fishing interrogatories" in

its scope was limited to the enquiry as to facts and expression of opinion upon matters of a *general* nature (the "origin, nature, and circumstances of the disturbances," and "the measures taken in" (that is, ordered, directed, or authorized, or honestly taken, for and with a view to) "the suppression of them"), and the conduct of those engaged in carrying out those measures, that is, measures for the suppression; and would not embrace even enquiry into, still less expression of opinion upon, conduct or acts *not* really in the suppression, though *under colour* of it, and which would be matters personal and criminal.

The Commission, it is conceived, was drawn (*a*), with careful reference to constitutional and legal principles, so as to include only such matters as the Crown could lawfully make subject of enquiry, and confer only such powers of enquiry or of opinion, as it could lawfully confer, and so as to *exclude* even *enquiry* into, much more expression of opinion upon, matters in their nature *criminal*, as to which there ought to be no inquisition, and which should be left to the ordinary tribunals.

Even if it were within the power of the Crown (*b*) to

as well known at law. The mischief of a "fishing inquisition" into matters *criminal* in their character, of course, would be infinitely greater, especially conducted with all the influence of the Crown.

(*a*) The preamble, and recital, with its terms, point carefully to such enquiries of a general nature as the Crown may *always* institute; or to those enquiries, into the conduct of its own officers and servants, in a matter of public concern, which it might lawfully institute by means of its Secretary of State; and which, if it might institute by one mode of enquiry, it might by another more convenient and effective; and further, they appear to be so carefully drawn as to point to their conduct in *the discharge of their duty* to the *Crown*—that is, in doing, however erroneously, and through error, or rashness, or wrong judgment, culpably, it might be, though not *criminally*, what they lawfully might do.

(*b*) It would be competent, no doubt, to the Crown to issue a Commission to examine into, and report upon, the law on any subject; and on which it might be desirable that the Crown would be informed, as, for instance, on the law as to martial law; though it does not appear that in the present case there was any such function given to the Commissioners. But it is conceived it would not be competent to the Crown, either to elicit and

grant larger powers, or to institute any other enquiries, it is conceived that the terms of the Commission, fairly construed, did *not* confer any larger powers, nor authorize any further or other enquiries than above indicated; and did not authorize the expression of opinion except upon matters of fact, and of a general nature.

Legally, and actually, it is conceived, the scope of the Commission was limited to matters in which the Crown had a *right* to be informed by means of an inquisition (*a*), and *did* not, as it *could* not, extend its scope beyond matters in which it had such right—that is, matters general, or matters not criminal.

The terms of the Commission, as to the first head of enquiry, showed that its scope was far wider than an enquiry into the conduct of those concerned. For the first head of enquiry was, the origin, nature, and circumstances of the disturbances. And that would be an enquiry into the origin, nature, and circumstances of the disturbances as matter of absolute fact, and as facts actually were; not as to belief, or reasonable grounds of belief, or the facts, as they appeared to the Governor and his advisers.

And if the scope of the Commission had been judicial,

publish facts tending to render men *criminally* liable, or to authorize persons to put forth expressions of opinion upon such facts tending to show such liability. For this, as it would necessarily prejudice their claim of a fair trial, would be illegal and libellous, as held in Sir F. Burdett's case (*vide ante*, p. 240); and it could hardly be competent to the Crown, under ordinary law, to do acts to the injury of subjects, which, if done by subjects, would be illegal and indictable.

(*a*) It has already been shown that the true scope of the Commission, and the only ground upon which it could be vindicated, was, informing the conscience of the Crown. But that, of course, could only embrace matters on which, by law, it had a right to be informed. It had a right to be informed as to the conduct of its own officers and servants, in the discharge of their duty to the Crown, for that could not be criminal, although it might, to a considerable degree, short of actual criminality, be culpable, and the Crown could censure or dismiss for mere errors of judgment, rashness, want of proper care or firmness of mind, &c., which could not render acts criminal, done in the discharge of duty. Here was ample and constitutional scope of enquiry.

or *quasi*-judicial, with a view to enable the Commissioners to pronounce upon the *conduct* of the Governor or military Commanders, in the exercise of a high discretionary authority, which must mainly depend upon the *spirit* in which they acted (*a*), they could surely have confined themselves to evidence as to the state of things as they appeared to the parties at the time, not entering into the actual truth, which might or might not be known at the time.

Even if the Governor and military Commanders had acted unlawfully, their conduct would, in judging of it, be considered with reference to the impression of the facts on which they acted (*b*), and supposing their proceedings not wholly illegal, it would be necessary to make out that

(*a*) One may apply here the language of Abbott, C. J., in commenting on the conduct of Francis Burdett, in publishing his strictures on the acts of the magistracy and military on the occasion of what was called "the Manchester massacre." "The truth or falsehoods of these facts is not the subject of enquiry here, but the spirit which actuated the defendant at the time of the publication. To judge of that, we must consider *his situation at the time*, and the means of knowledge which he then possessed." (*The King* v. *Burdett*, 4 B. and Ald. 328.) This seems to be the general principle of law applicable to persons who have acted in the exercise of a lawful authority, as for instance when a private person is sued for a malicious prosecution, or a Justice of the Peace proceeded against criminally for a malicious exercise of his powers. And it may safely be assumed that the position of the Governor of the colony is, to say the least, not *less* one protected by the law, so long as he acts in an honest *spirit*.

(*b*) It was even of a convicted libeller, that it was laid down, that as he acted upon information conveyed to him, his conduct was to be judged upon *that* view, without reference to the actual truth or falsehood of the information. The libel does not assume to proceed on facts known to the defendant, but only on information which he had received upon the subject, and it would not be proper to receive evidence that there was no foundation for these accounts which were given in the newspapers, and upon which the defendant acted. This would not constitute an aggravation of the offence, and the contrary ought not to operate in aggravation of it. (Abbott, C. J., *King* v. *Burdett*, 4 B., and Ald. 326). So Lord Mansfield applied this principle to the very subject of martial law. The enquiry, he said, would be, how the heart stood (*vide ante*, p. 75). So, Lord Chief-Justice Tindal, "whatever is done by him *honestly* in the execution of the object" (*vide ante*, p. 28).

they acted wilfully and contrary to their knowledge; but if they acted in the exercise of a lawful authority, *a multo fortiori*, their conduct would be rightly judged by their knowledge or means of knowledge at the time.

Moreover, although as regarded the first head of the enquiry, the origin, nature, and circumstances of the disturbances, that would involve whether they were rebellious, which would be an element of judgment, on the question of declaring martial law, it would only be one; and as to others, such as the strength and disparity of military force, &c., they would be matters mainly military, on which a Commission (*a*), mainly composed of civilians, would hardly be expected to pronounce an opinion.

The composition of the Commission, which was rather legal than military in its character, the legal element preponderating in the proportion of two to one (*b*), while it might be effective as to the eliciting of facts by strict legal evidence, was obviously unfavourable, so far as regarded the expression of *opinion*, or the foundation of judgment upon matters for the most part military.

The object of the Commission being to inform the conscience of the Crown, it was probably considered, that its

(*a*) The Commission was composed of one military man, a Colonial Governor, and two lawyers, whose assistance would be invaluable in eliciting facts by the examination of witnesses, testing their evidence, &c. But this was hardly the composition of a Commission designed to pronounce an opinion upon matters purely or mainly military.

(*b*) The officers engaged had to act on such information as they could get, and on such judgment as they could form at the moment, amidst all the excitement and emergency of a rebellion. They were only allowed to offer such evidence as was strictly legal, and as the commissioners formed their judgment upon the evidence they took, it follows that they judged by legal evidence men who had had to act without it. And further, in the formation of any judgment they might come to, upon the acts of the officers, or the military, they only had the advantage of the assistance of one officer in the Commission; while, on the other hand, his opinion would be, most probably, influenced by theirs, and the views of lawyers, on military matters, according to the judgment of the House of Lords in the great case of *Johnstone* v. *Sutton*, 1 T. R., would be worth nothing.

main purpose was the enquiry into facts, and that the expression of opinion, if any, was to be only upon general matters, and as to the effect or result of facts (*a*), not in the nature of judicial opinion, and that, therefore, it was that the legal element was allowed to preponderate in the composition of the Commission. For, it must be manifest that to the extent to which the legal element was introduced, the value of their mere opinion upon matters, in their nature so largely military, must be diminished.

It might, indeed, be doubted how far the constitution of the Commission, coupled with its composition, would authorize the expression of any opinion (*b*) upon the merits of the conduct of those concerned, so far as it at all depended upon military considerations (*c*).

It seems clear that, upon constitutional principles, the scope of such an enquiry could only be facts, to inform the conscience of the Crown, and could not embrace the pro-

(*a*) There would be ample scope for the expression of opinion, as to the result of a large body of evidence on any general matters, as, for instance, the character of the disturbances, whether rebellious or not, the existence of any organization, or of any causes of disaffection, and the like. This would be necessary in their report, to gather up, so to speak, an immense mass of facts into some general statement that, in their opinion, there was or was not such and such a state of things. This would be very different, it is manifest, from the expression of a judicial, or *quasi* judicial opinion, on the propriety of the acts of men.

(*b*) The Commission, no doubt, authorized the Commissioners to express opinions; but then that must be understood to mean on matters on which they might, properly, with reference to their own composition and their constitutional function, express opinions; as, upon matters of a nature general rather than personal, the nature and origin of the disturbances, whether they were of a rebellious character, &c. But if they went beyond that, for instance, as to the necessity for martial law, or for its continuance, or the measures taken, &c., they would necessarily trench upon matters mainly or purely military, in which the opinion of a tribunal mostly lay, and not military, would, to say the least, be sufficiently unfavourable, as almost certain to be influenced by the traditional ideas and prejudices of lawyers against proceedings arbitrary and military.

(*c*) That is, on so much as could be obtained by legal evidence and formal proof.

nouncing of any opinion upon the conduct of those concerned.

It may, it is conceived, be laid down as a matter of constitutional principle, that the Crown could not delegate its supreme power of censure or approval of its officers to any but its sworn, constitutional, responsible adviser, the Secretary of State (*a*); nor could the Secretary of State constitutionally delegate his high function of advising the Crown as to such censure or approval, however he might, for convenience, delegate his power of, or rather use any legal means for, obtaining information.

At all events, it seems that it did not come within the scope of the Commission even to enquire into, much less to pronounce upon, the conduct of the Governor in declaring martial law, for that would not depend on the result of the first head of enquiry, the origin, nature, and circumstances of the disturbances, as absolute fact; but upon appearances, as they presented themselves to his mind at the time, and on the assent and concurrence of his Council, which would be a high governmental act. Nor would it come strictly within the second head of enquiry, the measures taken in suppression of the disturbances, and the conduct of those engaged in the suppression (*b*).

The Secretary of State was perfectly aware that there

(*a*) Who would be responsible to Parliament for any error in his censure or approval, the consequences of which might be most serious, not only to the individuals concerned, but to the nation at large. For suppose that, upon wrong notions as to the law or the facts, a censure was pronounced upon a Governor or military Commander who, by his courage and promptitude had preserved a valuable colony to the Crown, and saved its loyal population from massacre, no one can doubt that a very heavy responsibility would rest upon the minister who so advised the Crown; and it would surely be contrary to constitutional principle that he should be able to shift off this responsibility upon others, not responsible to Parliament.

(*b*). The whole scope of the Commission seemed to imply that this alluded to the *active* measures taken; and even if the act of the Governor in council, in declaring martial law, was a subject of enquiry, it is doubtful whether it would warrant the expression of an opinion upon it.

were "difficulties inseparable from such an enquiry" (*a*), some of which he endeavoured to obviate; but others of which, as he implied, were incurable; and others, perhaps, were not foreseen at the time the Commission was issued. These difficulties were fundamental, arising from the very scope and nature of the enquiry into the conduct of a Governor and military Commanders in the discharge of a public duty in a distant dependency.

One difficulty was in this, that, as it was deemed impossible to conduct the enquiry satisfactorily elsewhere than in the colony itself, and equally impossible (*b*) to conduct it

(*a*) "It will, doubtless, be necessary that for at least a portion, if not for the whole of the time occupied by the enquiry, you should be present in the island. I inclose you a copy of the Commission given to Sir H. Storks, from which you will learn the mode in which we have endeavoured to overcome the *difficulties inseparable from the institution* of such an inquiry." (Despatch of Mr. Secretary Cardwell to Governor Eyre.) It is implied in this, that the Governor was expected to remain in the island, to submit to examination as to the transactions in which he had taken part; and, of course, if he gave any, he could hardly stop short of the fullest admissions and disclosures. And of course also, this would equally apply to the General in command, and the military officers engaged; and no doubt the Crown had a right, by means of a Commission, to ask orally for explanations which it might demand, and, indeed, had already demanded in writing. It was a very different thing, however, to receive evidence against them of *crimes*, and to do this *in public*, and the Secretary of State particularly alluded to one of the anticipated inconveniences of this. But there were others he could hardly anticipate.

(*b*) This was the reason for the passing of the statute, 42 Geo. III. (*vide ante*), for the trial, in this country, of a Governor or other officer, accused for any offence committed in his official capacity. This principle was applied in the suspension of the Governor, and the appointment of the President of the Commission as acting Governor for the Commission (Parl. Pap.) Alluding to the difficulty arising from the danger above mentioned, the Secretary of State, in his despatch to the President, wrote thus, "It has been represented to Her Majesty's Government, that any public enquiry into the state of the island, unless conducted with extreme caution, would have a tendency to unsettle the minds of the negroes. Her Majesty's Government have not been unmindful of this consideration; but by placing the supreme power of the colony, military as well as civil, in your hands, and making you at the same time president of the Commission, Her Majesty's Government feel that they have taken the best security against any such danger, without compromising the prospect of a full and impartial in-

there while the Governor, whose conduct was impugned, remained in office, it was necessary temporarily to suspend him, and this involved the appearance of prejudging his case, even before hearing the explanation or answer he might have to offer to the demands for explanation, transmitted by the Secretary of State. And this, it was feared, not without reason, would seem like an encouragement to rebellion, or discouragement to similar measures of repression on any future occasion.

There was, however, another overwhelming and insuperable difficulty necessarily incident to any such enquiry (*a*), the difficulty of getting any reliable evidence, beyond the statements of the officers and those engaged in the suppression. For, it is obvious that those who had been implicated in the rebellion, and who themselves had suffered, or seen their relations and friends suffer, in the measures of suppression, were not reliable witnesses as to the severity of those measures, or the conduct of those engaged in them. And this difficulty was abundantly realized in the present instance.

This latter difficulty, however, related principally to the second head of the enquiry, the measures taken in the suppression, and the conduct of those engaged in it. There was not so much difficulty as regarded the first head of the enquiry, namely, an enquiry into the origin, nature, and circumstances of the disturbances, that is, whether rebellious or not, which was to be an enquiry into actual facts, in order to inform the Crown as to measures to be pursued (*b*), and not merely as to the conduct of its officers.

vestigation." As, however, the explanations and answers of the officers had not been received, the duty would devolve upon the Commissioners, of determining whether there was any necessity for any further investigation, than would be afforded in those statements themselves.

(*a*) This difficulty was felt and experienced in the Ceylon case, in which the enquiry took place before a committee of the House of Commons, and the Government declined either to send a commission to the island, or bring over witnesses from the colony. (See Debates, Feb. 6, 1850.)

(*b*) Various measures as to the future government of the colony, and

The enquiry into the *origin* of the disturbances, necessarily and rightly went back into remote as well as more immediate causes (*a*), because it is obvious that, the more deep-seated are the causes and feelings which have given rise to a rebellion, the more dangerous is it likely to be, the more likely to spread and diffuse itself, quite apart from actual organization or conspiracy, by the force of those common feelings and causes; and, hence the enquiry elicited allusions to a former insurrection of the same class of the population, some thirty years previously, which had been attended with disastrous results, and the memory and admiration of which had, it appeared, been carefully kept up among the people.

more stringent measures for repression of dangerous practices, drilling, arming, &c., were before the Crown at the time the Commission issued, and it was manifest that these measures would involve considerations much larger than the conduct of the Governor and the military Commanders. Then there was the question as to the bill of indemnity (*vide ante*).

(*a*) There had been an insurrection of the negroes in 1832, at the time of emancipation; and there have been always those who had some sympathy with it. "The parish of St. James was the principal seat of the rebellion (falsely so called), shortly before emancipation" (Six months in the West Indies, by J. J. Gurney, published 1840). The excellent author throughout, spoke of "ignorant black teachers, of whom there were many in the island" (p. 161), and he everywhere pointed out the question of land and rent, as the great cause of discontent among the peasantry. A respectable witness went back, in his evidence, to this period, and stated that he noticed that there was a book circulated, holding up the persons suffering in the late rebellion (1832) as martyrs—"I found one of the books in some house—that was in 1864—they were said to be meritorious persons, and held up to admiration.' He also heard that there was drilling going on, and concluded that sooner or later an outbreak would take place. He came to that conclusion, not only from the drilling, but from the teaching which they were receiving (Ev. of Rev. B. Key). This was confirmed by evidence, even of various black preachers. A black minister, the Rev. S. R. Ward, who described himself as an independent Baptist, and resides in St. David's, a parish adjoining St. Thomas in the East, said that since September he had found a change in the demeanour of the peasantry. Witness was pained to find that G. W. Gordon, a great friend of his, was going about the district and making speeches, tending to unsettle the relations between master and servant, and to produce discontent among the peasantry. So the Rev. Mr. Beckwith and others gave similar evidence.

There was abundant evidence that there was diffused among the negro population deep-rooted impressions and ideas as to emancipation, especially as to its involving their right to the back or waste lands, without payment of rent (*a*), and there was also ample evidence to connect it with the present rebellion.

That the real origin of the disturbances was agrarian discontent, and the desire among the peasantry for the acquisition of land, and a notion which had been infused into their minds that emancipation involved their title to the lands, was proved by the entire evidence as to the language of the ringleaders (*b*), and in the opinion of the most intelligent and impartial persons who heard the *whole* of the evidence, it was the impression it conveyed (*c*).

(*a*) The whole tendency of Mr. Gurney's book, written a few years after the former insurrection, and a quarter of a century before the present one, was to show that the condition of the black population, and their content or discontent, turned upon the possession of land and the payment of rent. And the evidence was overwhelming, that these matters lay at the root of the present rebellion. It is hardly necessary to point out how deeply-rooted and widely-diffused such causes of discontent must be. And they were closely connected with the seat and stronghold of this rebellion, Stoney Gut. For Mr. J. M. Anderson, immigration agent and owner of the Middleton estate, *adjoining Stoney Gut*, confirmed the statements of other witnesses as to the impression among the negroes that liberty of person carried with it liberty of land, and that the Queen had given them the lands when she gave them freedom.

(*b*) For instance, it was proved that one of them *refused to pay rent—and said that white buckra had no right to get pay for back land*—and similar language was proved to have been used by other of the ring-leaders.

(*c*) For instance, the correspondent of the *Times*, who heard all the evidence, wrote that its result was overwhelming proof of the *agrarian character of the outbreak*. "The back lands," he said, "was the chief theme in all the seditious addresses by the Bogles to their followers, and the chief lever used in stirring up the peasantry to revolt. The peasantry of Jamaica were told by mischievous demagogues that they had a right to "the back lands;" that the Queen had directed these lands to be distributed among the people, but her generous intentions had been diverted by malevolent rulers in the island; that freedom was hardly freedom, if the freedman was called on to pay rent from which the slave

Under this head of the enquiry, evidence was received as to the more immediate causes of the disturbances, and as to their "nature," which would appear partly from their origin and partly from their circumstances; and as to these circumstances, which of course would tend to show their character. And evidence was accordingly received to show that the origin of the disturbances was seditious agitation, and that their character was that of rebellion (*a*).

As to this, there was a great body of evidence as to seditious meetings and publications, all under the auspices of particular persons, believed to have been the real and active heads of the rebellion; by one of whom the blacks were told to rise as they had done at Hayti, and massacre the whites, in order to get their lands (*b*).

Evidence was, further, given that these seditious publications had been carefully circulated by the leaders in

was exempt; and that the English people and Parliament, in emancipating the negro, meant to have given him the land on which he could support himself."

(*a*) According to the weight of the evidence on the subject, the causes of the rebellion had gone back many months, if not years. There was a good deal of evidence as to different causes of disaffection, but all agreed in *that*. The Governor, so long ago as April—the rebellion being in October—had written to the Secretary of State a despatch, containing a statement of grievances from the parish of St. Ann's; the answer of the Secretary of State to which (*vide ante* p. 114) had been made much use of, as ground for disaffection. But the weight of the evidence went to show that the real root of the rebellion was an impression among the blacks that they were entitled to the back or waste lands rent-free. Thus the rebellion had its rise in that most formidable of all sources of disaffection—agrarian discontent. And in August an insurrection, in another part of this island, was so imminent, that it was only prevented by the presence of men-of-war. (Evidence of Governor Eyre.)

(*b*) That is Gordon, and Bogle, and M'Laren, and several others, but chiefly the first two; both of whom had been very active in inciting the blacks in all parts of the island, especially the district in which the rebellion broke out; and at one of the meetings, Gordon was sworn to have told the blacks to do as they had done in Hayti (Ev. of Peart and Hunter), and at others he used similar language. (Ev. on his trial.) He had actually been remonstrated with on the tendency of this language to produce a rebellion, and had persisted.

the rebellion (*a*), especially in the district in which it broke out; and a series of meetings were also held, at which they made seditious speeches, sometimes directly inciting to insurrection and massacre.

There was abundant evidence (*b*) that there had been a

(*a*) Thus, there was at the end of July the Proclamation on "The State of the Island" (*vide ante* p. 114), in which the "poor people of St Ann's—starving people of St. Ann's—naked people of St. Ann's," were called on to "speak out and to act too." They were told, in this violent address, "The Government have taxed you, in order to defend your own rights against the enormities of an unscrupulous and oppressive foreigner, Mr. Custos Ketelholdt." They were told, "You have been dared in this provoking act, and it is sufficient to extinguish your long patience." Then, in August, a printed placard, addressed to the people of St. Ann's at Morant Bay, was posted on a cotton tree opposite Chisholm's house—it was put over another placard headed the "Queen's advice," and signed "E. Cardwell." This was on the high road. (Ev. of Mudie.) In August there was a meeting at Vere, at which Gordon said, "I, George William Gordon, say that they can't pull your houses down; *why don't you do as Hayti does?* they call you bad now, but then they will call you worse." This was proved by those who took notes of Gordon's lecture. It was proved by a printer to whom the original placard, headed "State of the Island," was handed for identification, that it was put in type by Gordon's directions; he told him to send fifty copies to St. Ann's Bay, two to Morant Bay, one to Paul Bogle, one to Chisholm, and one to Bath. This was done. (Ev. of Sharp and Gough.) Mr. Westmorland stated that the Government had received accounts of various public meetings held and presided over by G. W. Gordon, at which resolutions against the Government were passed—these meetings were held at Vere, St. Thomas in the East, St. James, St. Ann's, and Kingston. The speeches made at the last-mentioned place were not reported to the Government till subsequently, when the Government became aware of their seditious nature. He believed that those speeches were of so violent and bad a character, that they could not be published in the newspapers—the Government knew that they were attended by persons who were looked upon as political agitators and demagogues, but did not know the nature of the speeches made at the time.

(*b*) Thus in July there was Gordon's seditious proclamation, on the state of the island, the circulation of which he had carefully kept up, for in August a placard, containing one of its most seditious passages, was found posted up opposite to the house of an agent of his, a ringleader, one Chisholm. Then, in August, Gordon uttered sentiments at a meeting at Vere, highly seditious. He said, addressing the negroes:—"Do as the Haytiens have done. They call you bad now, but they will call you worse then." Then there was the following in a letter, dated September 11, 1865,

system of agitation *calculated* to incite the blacks to rise in rebellion, and every possible effort used to make them believe themselves oppressed, and to excite their feelings of animosity to the utmost against the white race. And that the leaders perfectly well knew that the course they were taking must lead to anarchy and rebellion (*a*), and were warned of it, and persisted.

There was a great deal of evidence, moreover, that after these seditious meetings there had arisen, under the auspices of the men who were the main promoters of them, in the districts where the rebellion broke out, if not in other districts also, those more unequivocal and formidable signs of a rebellion, secret arming, drilling, and administration of unlawful oaths, reports of which had come to the authorities (*b*), with rumours that the people

from one friend of his to another, "I wrote the feeble editorial that appears to second the noble exertions of the Vere people. What I desire is to shield you and them from the *charge of anarchy and tumult that in a short time must follow these powerful demonstrations.* (Evidence of Mr. Eyre.)

(*a*) Thus a respectable witness (Rev. Mr. Beckwith) said, "he had a conversation with G. W. Gordon about the system of agitation; and stated it was his opinion that it was *calculated* to create a spirit of disaffection among the people, and raise up a feeling against them, which had apparently laid for some time dormant. He stated that they *should persist in the movement*, and agitate in all the parishes as the people must have redress; witness made some other observations, and he said, 'we must have it some way or other; this is a great movement, and if the people did not get redress, there *would be a revolution* in six months;' after the outbreak *I made this circumstance known to the Custos of Kingston, and to the police magistrate, after he was taken into custody and before his trial.*"

(*b*) Vide the evidence of Bothwell, G. Thomas, Feller, Foster, and Osborne, so also the evidence of the Rev. W. Key, so the evidence of the Hon. Mr. Westmorland, who stated that in fact he had heard of drilling. The Rev. Mr. Ward (*vide ante*, p. 271), had mentioned similar matters to the authorities, so had the Rev. Mr. Beckwith. Mr. Westmorland stated, "In the month of July it was reported to the Government that private drillings were going on in Kingston by two black companies of so-called volunteers. In the latter end of August, I was travelling through the parish of Trelawny, and it was reported to me that the people, who usually took three weeks for August holidays, took four on this occasion; and my overseer informed me, they said that they were waiting

were expecting a movement to commence in the district where, in fact, the rebellion broke out.

The evidence also embraced information (*a*), furnished, indeed, to the Governor after the suspension of martial law, but showing the state of things, as to drilling, arming, &c., which existed *previously*, and tending to confirm the judgment he had formed; partly upon the rumours, no doubt, arising, in a great degree from the real facts.

And these statements were confirmed (*b*) before the Com-

for the Lord to come from St. Thomas in the East. Another of my overseers reported to me that they said, they were waiting for their saviours from the other districts who were coming there."

(*a*) Deposition of Coles, made 27th Nov. 1865, a fortnight after the suspension of martial law. He stated: "Since the rebellion in St. Thomas in the East, one Archibald M'Leish, in the district of Roses Valley, and William Chambers and Joe Levy, of Evergreen District, have been and still are in the habit of holding midnight meetings, from 6 o'clock p.m. to 6 o'clock a.m., at the house of William Chambers, when one Joe Levy kept guard. They asked me if I was a soldier, and whether I would join and drill them; I refused, on which they threatened to report me. I reclined outside the house, and heard William Chambers say they must make haste and get powder and guns, and those that had no guns must bring machettes; that they must go down and burn Mr. Coke's works at Oxford and shoot him; that he would keep his Bible in his hand, and when the buckras took him, he would swear that it was the Bible he was reading." He also stated "that at the house of Archibald M'Leish, in the district of Roses Valley, where I went to attend a meeting, supposing it to be a prayer-meeting, I found the door shut, and sitting down outside I heard Archibald M'Leish holding a meeting, and saying that he was going to town to buy powder and arms, to bring them down and hide them at a place called Thatch Walk; that they must all throw up to buy the powder—they wanted a puncheon; that they would rise the first day of Christmas, and shoot all the buckras; that they would come down when William Chambers and his party came from Evergreen, and meet together at a place called Bell Hill, in front of Oxford-house. I also saw a lot of bows and arrows in a heap in a corner of the house, and I heard him say when they had killed the buckras they would all go to the shops and drink and make merry. I saw there at Archibald M'Leish's house, William Coley and his wife, George Maitland and his wife, many whites, and very many others who I could not recognize, as directly I refused to join them, they rushed upon me with sticks, and drove me down the hill.

(*b*) Thus, for instance, one Coke said that at the end of October, a deserter from the West India Regiment, one William Coley, laid an information before him, and stated that he had been asked by people in the district

missioners, not only by the oral evidence of the persons who had made them, but by the evidence of respectable persons, to whom the witnesses had stated the same facts at the time, and further, by evidence of actual facts proved *aliunde;* so that the belief on which the Governor had acted, as to the rebellious and dangerous character of the disturbances, was established, in the strongest manner, by a three-fold confirmation.

Evidence was likewise given that the character of the black population (*a*) was such, from its ignorance and credulity and excitability, that agitation and disaffection were calculated to work far more serious mischief and cause far more imminent peril, than might result in a colder or more reasonable race; and that, in the opinion of those who were best acquainted with them, from long residence in the island, in such a state of disaffection, a spark would cause a flame of insurrection through the island, even without any premeditation or actual combination.

to drill them; that when he refused they put him outside the house, and that then, listening to what passed, he heard the people say that they must make haste and buy powder, take out these guns and machettes, and be ready to join another body of rebels. Coley said the people held these meetings four times a week, from six in the evening until six in the morning, and he offered to take Mr. Coke to one of them, but that gentleman did not think it safe to go. Some thirteen or fourteen men were afterwards apprehended, who acknowledged that they had held these meetings, in the very house which Coley had described; but they declared, of course, that they meant nothing wrong, and asked Mr. Coke not to believe what Coley had said about their object. (See also the evidence of Mr. Vickers.)

(*a*) (Evidence of Mr. Salmon.) He believed that the mass of the people were disaffected then, and that, at the time of the outbreak in the east, a spark in St. James's, would have caused the spread of the rebellion all through the west of the island. "They are," he said, "an extraordinary people, and their credulity renders them apt instruments for the agitation." See the instances he gives. See also the evidence of Dr. M'Cattie, who stated that, though this had no organization, a spark would have set the whole parish in a blaze. See also the evidence of Mr. Woolett, who describes them as imaginative and excitable, easily wrought upon, "like gunpowder with a spark," and prepared to rise if there had been a disturbance. And then it did not much matter whether the witnesses had seen among the negroes combination, or organization with a view to rebel.

There was a great deal of positive evidence (*a*) that the negroes had been overheard talking among themselves of a war which was to break out and go round the island.

Then there was evidence (*b*) of an actual organization, within the district in which the rebellion broke out, headed by those who were the leaders in it.

And even the very attempts made to ascribe the organization which, in point of fact, was set on foot for some other object than that of rebellion, not only failed to do so, but tended to show that the object was the very one, which, by an overwhelming weight of evidence, was shown to have been the real moving cause of the rebellion, viz., agrarian discontent, and a passion for the acquisition of land (*c*).

(*a*) Statement of Samuel Hunter, servant of the Hon. S. W. Mais.—"Told his master he heard at Orange Valley (Mr. Kerr's place in Trelawny), about seven miles from Falmouth, on Friday and Saturday, 6th and 7th October, people talking, saying 'a war would break out in about three weeks' time, to begin at Montego Bay and go round the island; then buckra would see hell.' This was quite confirmed by the evidence of many witnesses.

(*b*) Evidence of Nairne, Wheatley, and many others. See also the evidence of the Rev. Mr. Key, Rev. Mr. Beckwith, and Rev. Mr. Ward, which he said he had communicated to the authorities. The statement of Nairne was communicated to Mr. Westmorland, and so in many other instances. Further, there was the document already mentioned (*vide ante* p. 163), regarding the active leaders, and then there was a still more important document afterwards discovered. Among Mr. Gordon's papers at Cherry Garden, (in the proclaimed district), was found a list in his hand containing about 150 signatures, among which were those of Gordon himself, the Bogles, Bowie, and many who were afterwards personally engaged in the massacre. There was nothing on the face of it to explain the object for which these signatures were obtained, (Ev. of Dunker.) One of the persons by whom it was signed, Mr. Warren, a native Baptist preacher (of the same sect as Bogle) of Morant Bay, was called to explain this object, and his statement was that in 1863 a meeting was held at Gordon's house in Morant Bay, with a view to form "an anti-slavery society" in connection with the society of that name in England, and that the paper found at Cherry Garden was a list of persons who had joined the society. Mr. Gordon was present, and Chisholm acted as the agent.

(*c*) For the explanation was, that it was an Anti-Slavery Society. Now as there are no longer slaves either in Jamaica or in any other part of the

And it was proved further by several witnesses (*a*), that the leaders had distinctly told them that the blacks were to kill the white men, in order to get the back

British dominions, that abstract object was not likely to enlist the sympathies of men who, as the event proved, were ripe for rebellion and for massacre. But, on the other hand, there was a vast deal of evidence to show that in the minds of the blacks the abolition of slavery involved the acquisition of land, and that the great object and moving cause of the rebellion would be the acquisition of the back or waste lands. So that, if the explanation was true, it did no good. But there were other reasons to consider it *not* satisfactory. The witness stated (as the Recorder pointed out) that the paper he signed had a preface, as an *innocent* subscription would certainly have, and as a guilty one as certainly would not have, and *this paper had none*—but the witness *had signed other papers.*

(*a*) Thus, Nathanial Lake stated that "he took Bouie to Morant Bay on a day after the Court-house was burned; he was in custody, and said, 'Oh God, Mr. Gordon put us right out of our way.' I said what? He said, 'Gordon told us to destroy white and coloured men, but those that join them not to be destroyed;' I said tell it to high quarters at Morant Bay; he said, what is the use to speak, my son, as I will be hanged." George Lake said:—"On the Friday night before the Wednesday of the outbreak, Paul Bogle's son came to me and called me, and I went to Paul Bogle at Torrington—I found Bogle with some other men—it was in a meeting house—he said to me that 'a war was expected in St. Thomas in the East, that the people must be a friend of his alone; and that Mr. George William Gordon is their back, and several other gentlemen knew about it,'—that's what he told me; there were several persons there, and I saw him swear them—he swore me—and after I was sworn, he told me that there was going to be a war in St. Thomas in the East, and that Mr. Gordon was his back, and will know in what way to supply the people with gunpowder. So George Thomas Bogle sent a man to say that he wanted to see all the young men from Nutts River, and I went to the meeting—he called me, and said the meeting was a private meeting if we would like to join—Bogle and M'Laren asked this; we said, yes; because he said that it was for the benefit of all the blacks; M'Laren put my name down, and after that I kissed the book—Bogle told us 'that the meeting is held for Mr. Gordon,' and that Mr. Gordon said 'they were working for nothing, and he had written home to England about it.' The meeting was held at night, and lasted for two hours; I was there all the time—he told us that the back lands were belonging to us, but that the white people took it away, and that *Mr. Gordon had told him so;* he said that each place must have fifty men, with a captain to each, to join the volunteers, the same as the white man; and that he was going to see the man get justice at his trial at the Court-house, for white man

lands, and there was to be what they called "a war," shewing that the negroes themselves knew perfectly well that it was a war which they were about to wage—a war against the Crown and its peaceful subjects.

There was positive evidence (*a*), confirmed by a great deal of circumstantial evidence, that the attacks on the police in the district had been deliberately arranged by the leaders of the rebellion, and this, only a week before the outbreak; and that all that followed was in consequence of these deliberate arrangements.

And this evidence was carried down to the time and circumstances of the attacks upon police and the magistrates

took too much advantage of them." A Captain of Maroons stated that about three or four weeks before the outbreak, Paul Bogle came to him, and Bouie was with him, and said that "he wanted to beat all brown and white people off the island, and find a place to secure Mr. Gordon." Bogle said that he was going to the Court-house to have a battle—that he wanted to ask the Maroons not to interfere, but that he was afraid of them—he said it was the Morant Bay Court-house.

(*a*) Thus George Thomas, the witness already referred to, whose evidence was produced on the trial of Gordon, stated that he attended a Bogle meeting at Torrington a week before the outbreak, in a house near the the Baptist chapel. Paul Bogle and M'Laren were there with "plenty of people." Bogle, addressing the people, said this meeting was held for Gordon, or by his wish; Gordon said that the blacks worked for nothing at all; that they ought to have 4s. a day, and that the back lands belonged to the black people, but had been taken possession of by the white ladies and gentlemen. Bogle added that the black people in each place must form themselves into bands of fifty men, with a captain to each, and that they should have volunteers, as the white men had. He urged them to go to the bay on Saturday and see a man tried there, so that he might get justice. His name was Francis Miller, of Stoney Gut, and Bogle said he had joined the "gang." Thomas got a message on Monday night, that he must go to Stoney Gut; and on reaching there at midnight he found the chapel full, and bodies of men kept marching in until daybreak. Word was passed that the police were coming, and they all remained silent until Bogle summoned them, when the police were surrounded and taken prisoners. Thomas was drilled along with other negroes, and went down to the bay with Bogle's "gang" on Wednesday. Gordon could hardly have been ignorant of all this. In the outbreak at Morant Bay, Thomas received a wound in the shoulder, and while in the hospital he made a deposition, used against Gordon at the court-martial.

which formed the outbreak of the rebellion (*a*), and went fully to support the accounts received of it at the time, that they were organized and deliberate attacks, by large bodies of armed negroes, previously organized, armed, and assembled for the purpose of such attacks, and that they had all the character of acts of armed rebellion.

The evidence of eye-witnesses as to circumstances of the original disturbances (*b*), showed, beyond a doubt, that they had all the character of a deliberate armed rebellion, for they showed that not only were the outrages deliberate, but that, in pursuance of the design, the rebels went about forcibly seizing arms, and actually stormed a police-station, and supplied themselves with fire-arms therefrom, before attacking the magistracy and volunteers.

There was not only positive but undoubted proof, in the

(*a*) Evidence of Cresser. He was seized by a body of 200 or 300 armed men, and taken to Stoney Gut, the seat of the rebellion, and the residence of the active ringleaders. Here he saw the ringleaders and other men, go alongside the chapel with men in a line ; one was drilling them with the words "right shoulder arm, and march ;" he marched them round the chapel ; about thirty were drilled. Whilst they were doing that, Craddock (one of the active leaders) said, "that the country was theirs, and they were getting it, they must hold on, they were long trodden under the grass. The police gave similar evidence as to what they had seen, when seized and imprisoned by the ringleaders, just prior to the actual outbreak, and what they saw and heard they had reported to the 'Custos.'" One of them stated, "When I saw them drilling, they were arrayed three by three. They brandished their cutlasses. Colonel Bouie had a cutlass, which he brandished. Colonel Bouie said, 'Men, turn out to drill, and drill quickly.' That was before they went out. Was not near the drill field, and could not hear the orders given. The companies were marched out by hundreds. After one hundred was finished, another came out; three companies went out. They were headed by a fife and drum." (Evidence of Fuller, Foster, Osborn, and Bothwell).

(*b*) Thus, it was sworn that a body of them went to a private house, on the morning of the day of the massacre, and demanded guns, with threats of murder (Ev. of Cresser), and that later in the day, they stormed the police station, and took all the fire-arms they could find (Ev. of Albergu and Anna), and that they swore that they would kill every white and brown man, and then they attacked the Court-house. That this amounted to a levying of war against the Crown (*vide ante*, p. 13).

shape of written documents (*a*), of such close association between the secret and the active leaders of the rebellion, in seditious meetings, &c., as to raise the strongest presumption that, as the *latter* had for months been engaged in secret arming and drilling, the *former* must have known of it, and been privy to it, and there was the most probable proof (*b*), that he was in actual complicity, not only in the scheme of the rebellion, but the massacre.

The evidence taken as to the circumstances of the original outbreak, clearly showed (*c*), out of the language used by the active leader himself, that the massacre was not only deliberate and previously designed, but that it was the outbreak of an insurrection, of which the object was the massacre of all the white men. And so of the subsequent outrages elsewhere.

That the massacre, which was the outbreak of the rebel-

(*a*) Letters were put in showing the closest association between him and Bogle, the leader in the massacre. The following is from Paul Bogle to Mr. Gordon:—"Dear Sir,—Provide more things for me to vote upon for the year coming; get the horse for me to ride on business. We expect a meeting, and your attendance will be required. Paul Bogle." These meetings were beyond all doubt seditious.

(*b*) It was proved that his agent (Laurence) was privy to the plan of the massacre, and informed a friend of it before it occurred (Ev. of Major). It was proved that he himself was privy to it, for it was proved out of his own mouth that he warned one of the victims not to go (Ev. of W. Lee). The witness said, "I told him of the occurrence; I said that the Baron had been murdered, and that the news came down that the people had killed him; I said, 'George, I am afraid that your agitation in St. Thomas in the East has caused this outbreak;' he said, 'No my friend; I never gave them bad advice, I only told them the Lord would send them a day of deliverance.' I told the Baron not to go, but he would go, he was such an obstinate man."

(*c*) Thus, one of the volunteers who escaped stated, "Whilst hiding, I saw the Baron; Paul Bogle came up to him, and said, 'we have found you, eh?' Bogle said something about money; the Baron said, 'if it is me you want, here I am, take me.' Paul Bogle said, 'we don't want you alone, we want all the buckras and volunteers,' and they killed him. Paul Bogle said, 'Ah, my boys, did I not tell you to-night we would do the work." So, at Amity Hall next day, their cry was, "kill the whites, let not a *white brute* escape" (Harrison). So at Bath, "kill the white men, and we will have their places for ourselves" (Kirkland). So at Manchioneal.

lion, was deliberate and designed, was proved not only by the words and acts of the open and acting leaders, but by the knowledge of others—the more secret leaders at a distance—as to what was about to occur (*a*), and warnings given to intended victims.

It was proved (*b*) that many of the prisoners, executed under martial law, declared with their dying breath, that the two men executed as the secret and active leaders of the rebellion had brought them to that end, which was naturally enough regarded at the time as sufficient ground for suspicion.

The evidence under this head (*c*), in short, went strongly

(*a*) Thus, that Laurence—the agent of Gordon, the real though secret author of the rebellion—knew of it, was proved at his trial before court-martial by several witnesses. He told the wife of one Major, who had gone to the meeting where the massacre took place, that he was safe, but that the Custos and others "were doomed," though Major was in fact saved partly by her saying he was a friend of Mr. Gordon's. (Ev. of Major and his wife.) And that Gordon himself knew of it, was proved by what he said the day afterwards. "I told the Baron, (the 'Custos') not to go, but he was so obstinate." (Ev. of Lee.)

(*b*) Then Colonel Hobbs wrote a despatch to General O'Connor, informing him that he had proofs of G. W. Gordon's guilt. That despatch was written, he stated, in consequence of what he heard from prisoners. He first heard the name of Gordon as one of the leaders whose name was coupled with Paul Bogles'. "A prisoner, who had been convicted, before his reprieve, told me that "Gordon had given the lamp to Bogle for the chapel; it was then the idea occurred to me that G. W. Gordon was the leader of the rebellion; the testimony of these prisoners *en masse*, of which he took pencil notes, especially among the ringleaders—coupled the names of Gordon and Bogle with the rebellion; I asked them what had caused them to join the rebellion, and they unanimously said, "It was not our fault; it was Gordon and Bogle that made us join,—about thirty told me that." So the Brigadier in Command stated that he was present at the execution of a prisoner, who said that Gordon had brought him to this, and that statement was proved on Gordon's trial. And another witness so stated; but one of the rebel ringleaders, a man named M'Laren, Paul Bogle's secretary, cried out at the time of his execution:—"You people, take warning, that I was elected secretary to Paul and Moses Bogle, because I could write; they and George William Gordon have brought me to this." See also the evidence of Mr. Espeut.

(*c*) "Mr. Benjamin to Governor Eyre:—Easington, St. David, October 12, 1865. As Magistrate's Clerk of the Parish of St. David, I beg leave

to bear out the impression formed by the Governor from the information he received at the time—that there was a rebellion which was spreading rapidly in every direction, and was causing everywhere the greatest alarm and the most urgent call for troops. And, from the first, the danger apprehended was the *escape* of the rebels, and the *spread* of the rebellion.

A vast body of evidence was afterwards given (*a*), which showed that the massacre which formed the outbreak of the rebellion was followed up the next day by similar acts; that

to inform you of a serious outbreak in the parish of St. Thomas in the East, which has resulted in the death of several influential gentlemen, among whom are the Baron, our Custos, the Honourable W. P. Georges, Mr. Price, Rev. — Herschell, and several others; the volunteers beat down, and several murdered; the entire Court-house burnt down, police-station demolished, &c., &c. I have further learned that it is the intention of the rebels to come into Saint David and destroy property, and murder every respectable man. We are without protection, the police having been taken away to Morant Bay, and the constabulary force being so small, would avail nothing among a large body against us. I therefore would suggest to his Excellency respectfully (if not too premature) that a company of troops be sent to Yallahs, and one to Easington (if available) to protect the parish, which I consider to be in imminent danger." (Which was immediately ordered.) "Captain Ross to the General:—Morant Bay, October 13, 1865. I have the honour to report, for your information, that the force under my command disembarked here this day, and will encamp. The civil authorities have been massacred, with one or two exceptions, by the natives of this, and the rioters are now reported to be destroying the plantations in the vicinity."—"To Mr. M'Every, J.P., dated Richmond Vale, October 12, 1865. I am sorry to inform you that the people down the valley have risen; they have burnt down the Court-house, &c., at Morant Bay, released all prisoners, and killed a number of white people. A released prisoner who has come this way states that it is the mob's rumour that *they are to proceed with their work of devastation up this way;* therefore I have written to you that you may use your discretion as to what is to be done, and to make it known to those it concerns." (This was sent to the Governor.) Then there was the letter readby Mr. Commissioner Gurney from Mr. Davidson, J.P., to Governor Eyre—"Sherwood Forest, October 12, 1865. It is the intention of the mob to go up the Valley, and onwards, I fancy in this direction."

(*a*) As at Amity Hall, where one white person was massacred and several others cruelly beaten and left for dead. (*Vide* evidence of Hire, Jackson, &c.)

large bodies of armed negroes went to various estates (*a*), and either massacred the white proprietors, or sought for them with the avowed intention of slaying them, and this drove them to seek safety in flight (*b*). And that the negroes went about uttering threats of extermination against the white men, the women being reserved for a viler fate (*c*).

The evidence showed that though the negroes did not kill any of the white women, they subjected them to the grossest indignities (*d*), reserving them, as they avowed, for a viler fate; and the expressions the rebels used abundantly indicated that the object of the conspiracy was, on the one hand, to kill the white men, so as to obtain entire possession of the island; and, on the other hand, to reserve the white women for themselves (*e*).

The enquiry as to the "nature" of the "disturbances," of course, contained evidence as to its *extent*, which might be proved from the amount of damage done, and the great extent of the outrages; or the numbers of negroes engaged

(*a*) As at Mr. Foote's, Mr. Patterson's, and other places. (*Vide* their evidence, and evidence of Field, Frendish, Rennell, and Flemings.)

(*b*) Evidence of Mr. Eyre and Mr. Westmorland, that Kingston was soon full of refugees, driven from their homes by dread of slaughter.

(*c*) Evidence of Kirkland, Field, Shortridge, Harrison, &c. The cry of the blacks was "Colour for colour; kill the white men, and we will have their places for ourselves." That the *women* were for a viler fate, was proved by the evidence of many witnesses. (Ev. of Mr. Hitchen, Mr. Herschell, Mr. Shortridge, &c.) Women were ravished (2 Parl. Pap. 35.) That the rebels meant to kill all the white men, was shown by their acts everywhere. For instance, when they got into the town of Manchioneal, this was their cry. (Ev. of Burke.) And this was at a considerable distance from Morant Bay, about half way between it and Port Antonio, which is forty miles distant, and to which the rebellion rapidly extended.

(*d*) See the evidence of Mrs. Hitchin, widow of one of those who were slain in the massacre, and of Mrs. Herschell, the widow of another of the victims, and of Mrs Shortridge, and many others.

(*e*) This was extremely important, as its effect would be naturally to *madden* the whites, and thus to excuse a greater amount of severity in the suppression of the rebellion than might otherwise have been displayed. It is impossible to conceive of an insurrection begun under circumstances more horrible, or with greater circumstances of exasperation and provocation among those who were to be its victims.

in them. Official proof was given (*a*) of the actual extent of the rebellion, as indicated by the places at which houses had been not only searched, but gutted, burnt, and destroyed, as by an invading army; and this comprised not less thna fifty places, and a thousand houses, spreading over a distance of forty miles from the scene of the original outbreak.

From the numbers of negroes actually engaged in the insurrection, that is of those who were present aiding and abetting in the original massacre, or at the murders, or attempts at murder, or acts of outrage, which (*b*) after-

(*a*) John Parry, sworn, and examined—Am Government engineer for Surry—I have made a survey of all the districts in which were the recent disturbances, and have made a report of all houses or buildings destroyed. [Report presented and read as follows :—]" Return of all houses or buildings destroyed during the recent disturbances. Monklands 14, Duckworth 11, Ross Isle 27, Mount Lebanus 78, Somersett 101, Trinity 10, Coley (North) 51, Garband Hall 39, Hill Side 6, Spring 14, Danvers 6, Huntley 2, River Counts 7, Coley (South) 21, Foot Hill 21, Nutts River 24, John's Town 18, Beckford Town 13, Prospect 26, Harbour Head 13, Port Morant 3, Old Pera 5, New Pera 2, Barking Lodge 11, Dalvey 9, Duckenfield 9, Amity Hall 2, Happy Grove 19, Belle Castle 24, Williamsfield 2, Haining 6, Dillon 13, Grange Hill 15, Spring Valley 20, Manchioneal (Barracks and Fort) 54, Darlingford 14, Landshere 11, Kensington 4, Pleasant Hill 4, Panton's Hope 5, Cog Hall 20, Long Bay 7, Black Rock 2, Boston 1, Friendship 6, Wheelerfield Estate 1, Sunny Hill 9, Airey Castle 18, Thornton or Torrington 91, Style Hut 17. Total destroyed—1000. The houses set down in the above are actual dwellings, and not including kitchens and outhouses. Value of the 1000 houses, including kitchens and outhouses and not with furniture, £4426.

(*b*) There were, according to the testimony of many witnesses present, not less than 700 or 800 at the original massacre at the Court-house at Morant Bay, and it was remarkable, and was stated in evidence, that few went from Morant Bay to other places where risings took place; and those risings were quite separate. At the murder at Amity Hall next day, there were probably two or three hundred, so at Bath, Manchioneal, Port Antonio, and other places, where the negroes were seen in force, in bodies of two or three hundred at a time. Putting these numbers together, it is impossible to estimate that there were less than four or five thousand of them actually *engaged* in acts of murder, arson, plunder, and armed rebellion. This must necessarily represent a far larger number, more or less implicated; and it was only in one county that the acts of rebel-

wards took place, inferences could be drawn as to the number of men actually engaged in the rebellion, which could not have been less than some thousands, the numbers really implicated being, of course, far larger.

The evidence was overwhelming, that at all events within the declared district there was a general, or very widespread disposition among the negroes to massacre the whites (*a*); and there was also much evidence of a similar disposition in other districts. Whether or not this was the result of an organized conspiracy (of which there was evidence, at all events, in the disturbed district), or of a general feeling of animosity against the whites, would be immaterial, except that the latter case, of course, would be infinitely the more formidable danger.

Further than this, it was well-known (*b*) that even the

lion occurred, and for the most part in one parish, where also most of the military operations took place.

(*a*) Thus, numerous witnesses proved that on the days following the original outbreak, the negroes went about crying, "Colour for colour; kill all the whites!" Negroes themselves proved this, as well as whites. For instance, a witness named Thomas Burke, proved that he heard the people say when they came into Manchioneal, that they had come to kill all the white men. Moreover, many witnesses, whites and negroes, proved that the negroes themselves deemed the identity of colour and race the strongest bond of union, insomuch that they deemed it treason in a black man not joining the insurrection. (See evidence of Cussens.) In the parish of St. James several threatening letters were received, and it is remarkable that one of the houses which, according to these letters, was marked out for burning, actually was burnt in December. A man was convicted there for seditious language in saying to another negro, "If the war is crushed out in St. Thomas in the East it will break out here, and then would you, being a black man, not join the black people?" There were many similar cases.

(*b*) It was afterwards proved by many credible witnesses, and as it was the most remarkable, so it was the most formidable fact in the case; for it showed how entirely the safety of the whites depended upon gaining, and gaining at once, the ascendancy, so as to discourage the worser, and encourage the weaker portion of the hostile race. This is, indeed, as has often been pointed out, the great evil of rebellion; that, in the long run, it carries along in its current those who really were not desirous

better disposed of the blacks were but waiting to see which would prove the strongest, the whites or the blacks; and in the event of those of their own colour gaining the ascendancy, many of them actually avowed that, however much they might regret it, they would be compelled to join them, and this was the *main danger*.

It was stated that it was well known to those of longest residence in the island (*a*), and who were best acquainted with the negro population, that though (happily) not themselves of much ability for organization and actual combination, they had elements of character infinitely more formidable, with reference to rebellion, and that they were so easily worked upon, and in such a state of disaffection, brought on by mischievous agitation, that a spark, if not promptly extinguished, would suffice to fire the flame of a universal insurrection (*b*).

The evidence of the existence of an actual organization among the blacks, with a view to a rebellion, would be less material, because, from its nature, the existence of such

of joining it, but who at last are compelled to do so in self-preservation. Even the best of the negroes said, "they must join the insurrection, if it extended." (See the ev. of Miles, Carr, Brooks, Lowe, &c.)

(*a*) This was stated by some in the highest position in the island, and who had resided there for long periods of twenty, thirty, or even forty years. (See the evidence of Mr. Salmon and Mr. Westmorland). And the phrase used was the one adopted in the text, viz., that the state of disaffection among the negro population was such, and such was their ignorant, inflammable character, that a spark would kindle it into a flame from one end of the island to the other. This was proved, in point of fact, by the circumstance, that, for several days after the first outbreak, there were similar risings on the whole eastern part of the island, an extent of forty miles.

(*b*) All this, it will be borne in mind, was most material, not merely with reference to the necessity for declaring and continuing martial law, but also with reference to the nature of the particular measures taken in carrying out martial law; which would necessarily be adapted to the nature of the rebellion. And hence the close connection between this head of enquiry, as to the circumstances of the disturbances—and the other, as to the measures taken for their suppression.

an organization would hardly admit of express or direct proof, but must be, more or less, matter of inference, and also, because there may be, in the sympathies of race, and of common disaffection, and common feelings of animosity, far stronger and more formidable bonds of union than any actual organization.

The evidence (*a*) of persons in high positions, best acquainted with the island, entirely confirmed the view which the Governor had all along taken, as to the origin and nature of the disturbances, that they had their origin in a seditious system of agitation, tending necessarily to excite disaffection among the negroes.

Evidence was given (*b*) as to the circumstances of the

(*a*) Ev. of Mr. Hosack. With regard to the Underhill meetings and the political meetings held during the summer in different parts of the country, Mr. Hosack expressed a strong opinion, founded upon his own observation and knowledge, as well as upon the reports of custodes and magistrates already in evidence, that very bad effects had been produced upon the people by the speeches there delivered, and that they gave rise to a state of feeling which made the Morant Bay outbreak more dangerous than it would otherwise have been. The principal points discussed at those meetings were taxation, land, and the administration of justice at petty sessions. Of course he did not mean to say that a member of the Assembly, as Mr. Gordon was, might not hold meetings, and express opinions in opposition to the Government, if he thought fit ; but this was always supposing that he did not do this with the object of promoting rebellion; and Mr. Hosack believed that Gordon's speech at the Vere meeting, when he called on the people to do as they had done in Hayti, was made with a view to excite rebellion. He said that Colonel Fyfe had inquired at the time into the truth of the statement, and had written him a letter, in which he said, "We are slumbering upon a mine."

(*b*) *Vide ante*, p. 120. "Mr. Westmorland put in official letters received by the Government from the authorities in nearly every part of the island calling for arms, ammunition, soldiers, and means of defence. At the same time, families flocked into Kingston from all parts of the island; refugees arrived from St. Thomas in the East in a most pitiable plight, stating the intention of the rebels to murder all the white and coloured people; all these things added to the excitement and alarm; and the magistrates of Kingston passed a resolution calling on the Governor to come there and consider the propriety of proclaiming the town. Application was made to Admiral Hope for assistance, a vessel being despatched to St. Jago de Cuba, and a telegram being despatched to Havannah, with a re-

disturbances; and the circumstances under which martial law was declared. For the first ten days after the outbreak of the rebellion, the utmost alarm and consternation prevailed through the eastern and central parts of the island, especially the eastern, where the insurrection had broken out; the whites were driven in numbers from their residences, forced to seek safety in flight, and it was not until after the lapse of a fortnight, and after energetic military measures, that anything like confidence began to be restored.

The members of the Council also stated the grounds on which martial law was proclaimed (*a*), in accordance with the unanimous opinion of the Council, and upon the judgment of those in the best position for forming a judgment upon all the circumstances of the island, the character and number of the black population, the spread of disaffection, the apparent imminence of general insurrection, and the small amount of military force to meet it.

quest to the British consul there to send on a fast steamer to the Admiral at Halifax. Applications for help and for arms poured in from all quarters of the island, representing the defenceless condition of the several parishes, the insufficiency and inefficiency of the police, their want of arms, the disbandment of the volunteers, the disaffection of the people, and the general alarm. Mr. Westmorland produced a large number of these applications, all to the same effect, and all pretty much of the same urgency. During the first ten days of the outbreak every precaution was taken. A large quantity of powder was placed on board vessels in harbour; cutlasses were collected from the various stores and lodged in safe custody; and about the 19th of October the people began to be reassured."

(*a*) Thus Mr. Westmorland, a member of Council, being asked his reason for assenting to the declaration of martial law, said it was because the Custos and a great portion of the civil power of the parish had been destroyed at Morant Bay; because the Government had information that the people in the Blue Mountain district were all rising; because he also had to take into consideration the inadequate military force at the disposal of the authorities, the difficulty of communication during the rainy season, and the probability, from his knowledge of the negro character and their susceptibility to bad influence, that insurrection would spread, if not immediately checked. The Council of War, Mr. Westmorland said, were unanimous in favour of proclaiming martial law over the county of Surry, Kingston excepted. The proposal to put the whole island under martial law did not

They stated it was the honest belief (*a*) in the minds of those best informed, and of the greatest intelligence, and the longest residence in the island, that, if the insurrectionary spirit were not crushed at once, it would spread with fatal rapidity. And that the disaffection was general, and that the local dispute was only the *spark* which fired it into a flame.

The enquiry into the nature and accounts of the disturbances also embraced a vast quantity of evidence as to the course taken by the insurgents (*b*) when martial law was

emanate from the Governor, but from one of the members, and some of those residing in Kingston were most anxious that that town should be included, but this was thought inexpedient.

(*a*) See the evidence of the Hon. Mr. Salmon and the Hon. Mr. Westmorland, the Attorney-General, &c. Mr. Salmon, who was present at the Council of war, said "he had no other information as to the disturbance in St. Thomas in the East, except having heard of the massacre—he concurred with the proposition of declaring martial law—as he believed there was a necessity for it—he cordially and perfectly agreed with the immediate and decisive action taken for suppressing the disturbances, because he believed if those steps were not taken, the rebellion would have extended over the whole island, because all the people were dissatisfied—he believed that if a rebellion broke out in St. James's, it would extend to St. Elizabeth's, and in fact would be widespread. If the rebellion had not been crushed so rapidly, Jamaica would have gone, and the whites would all have been dead by that time. Every man who knew the negro character, knows now that we are unsafe. His very carpenter told him that if the blacks rose, they would massacre the whites and coloured—have no reasons to know that there was a combination, for there was no time for that, but believed that if the Morant Bay rioters went through the other parishes, they were all prepared, and would have risen." The Attorney-General stated, "I think that there was a *necessity* for martial law, *and that it prevented the spread of the rebellious spirit.*"

(*b*) This really lay at the root of the whole matter, and the misunderstanding of it gave rise to most of the aspersions on the conduct of the Governor and General in continuing martial law; and the officers engaged in carrying it out. It was supposed that rebels ceased to be rebels, or ceased to be dangerous, when they withdrew from actual insurrection, not venturing to meet the troops, and lurked in the woods; whereas, that was the most difficult and dangerous phase a rebellion could take. It would be comparatively easy to deal with them in the open field; but nothing is more harassing or exhausting to troops than to dislodge and drive out bodies of men holding a dense and inaccessible "bush." Yet, if they were *not* driven out, they would lurk there until the military withdrew.

put in force. That is, that instead of meeting the troops openly in the field, they betook themselves to the "bush," in districts difficult of access, and abounding with natural fastnesses; whence it would be difficult to drive them, and where they might wait until the military were either exhausted or withdrawn.

Evidence was given (*a*) that in the neighbourhood of places which had been sacked and plundered by the rebels, the houses of negroes were deserted by the men; while arms, ammunition, and plunder were found therein (*b*), and that in the "bush" all around, large bodies of men were seen lurking, who had evidently withdrawn at the approach of the military, to hide there until the military withdrew.

Similar evidence was given (*c*) with reference to the

(*a*) The evidence was principally that of the officers in command of detachments, and the gentlemen who accompanied them as magistrates or volunteers. They all concurred in this: houses deserted, ammunition and plunder therein, and negroes in the bush. The inference was obvious and unavoidable. (Ev. of Colonel Hobbs, Captain Hole, &c., *vide ante*, p. 167.)

(*b*) This was the key to the whole case. It bore upon the necessity for continuing martial law to dislodge these lurking bodies of rebels. It explained the alarm which prevailed. It caused a continued demand for troops. It rendered it necessary often to fire upon men who might not be at the moment in arms, but who were merely waiting to resume them. And it also explained the reason for the burning of houses.

(*c*) Governor Eyre to the Brigadier-General, said:—"I continued martial law in force after the amnesty was declared, because there were rebel prisoners to be dealt with, and because I had received information that there might be expected disturbances in other districts. I received various communications from every part of the island as to expected further risings. They were very numerous, and showed that there was a seditious spirit in the country, and it was very unsettled. There was no difference of opinion expressed as to the continuance of the court-martial. No application was ever made to me for its cessation. I think it was necessary for martial law to continue after the amnesty; my idea was that martial law should be kept up until every rebel had been caught and all offenders punished." Mr. Espent, a member of the Assembly, said:—"There was still very great alarm existing at Morant Bay up to the 6th of November, in consequence of no one working on the estates. The proprietors had mostly fled. Every one in Morant Bay seemed apprehensive of another general rising. The

continuance and *duration* of martial law, and especially as to its continuance for a short time after the amnesty; that is, evidence, on the one hand, as to the nature of the disturbances, and, on the other hand, as to the deficiency of military force, which also would be equally material as to the particular nature of the military measures taken under martial law. And there was a good deal of evidence to show that it was necessary to continue martial law for the purpose of preventing a *renewal* of the insurrection.

The Governor in his evidence (*a*), referred to official communications, in support of the opinions entertained that the general state of disaffection rendered a renewal of insurrection probable. And he stated that although an amnesty was proclaimed, martial law was not abolished until a fortnight later; because, in the judgment of those in the highest position, and with the best means of information, it

continuance of martial law was caused by what we heard from many persons throughout the different districts.

(*a*) Many of which have been given (*vide ante* p. 224). He produced many others. "After the amnesty had been proclaimed, the Government received a letter from the Custos of Manchester, who spoke of nightly meetings among the people; at Montego Bay the withdrawal of the force sent there was strongly complained of; from Hanover came a presentment by the grand jury calling attention to the unprotected state of the loyal people there, and expressing an opinion that the disaffection was widely spread. On the 14th of November there was a similar presentment by the grand jury of St. James, pointing out the inefficiency of the police, and the fact that a latent spirit of discontent appeared to exist among the labouring classes. There was a letter from Mr. Lynch, enclosing a threatening notice he had received as to holding the Court at Spanish Town. He cited these communications to show the pressure put upon the Government at this time, and prove that the public anxiety and alarm had not yet subsided. The Custos of St. David came to the Government and urged them not to discontinue martial law, inasmuch as life and property were not yet safe. At the time when the amnesty was issued, there were three different parts of the island in which disturbances existed—Westmoreland, St. Ann's, and Port Maria,—and, that being so, it was not desirable to remove the terror which martial law naturally inspired, not only in the district where it was in force, but all over the island. The police force, small as it was, was very imperfectly armed, and the volunteer movement was nearly at death's door." (Ev. of Mr. Eyre.)

was still unsafe to remove it; as there was a general feeling of apprehension, and universal belief in smouldering disaffection. This, it is obvious, was a matter of judgment.

The Royal Commissioners (*a*) received any communications or representations made to the late Governor at *the time* of the occurrences in question, as showing the materials then before him for his judgment, though they declined to allow him to state the inferences he had drawn thereupon, or the impressions he had formed; their enquiry under this head being only as to facts, not opinions.

The question how long martial law should be continued, like the question whether it should be declared at all, as it depended entirely upon danger, must turn on circumstances as they appeared and were observed at the time; and not only those who had been longest in the island, but, on the other hand, those (*b*) who were unconnected

(*a*) The Governor produced communications stating serious apprehension of an expected outbreak in that parish. It was remarked by Mr. Gurney that this letter, and others of a similar kind, could be taken only as communications to the witness, and not as evidence relating to any of the facts contained in them. Describing, in the course of his statement, the inferences and opinions which he drew from documents as they came into his possession, Mr. Eyre was met by the objection that, as those documents were put in as evidence, he had no need to draw largely upon them in his statement. As Mr. Gurney said, "The inference to be drawn from those documents would be drawn by the Royal Commissioners themselves; however, the Royal Commissioners are of opinion that you are limited in your statement to facts, and that to argue upon documents is not in the province of evidence. All argument must be excluded from your statement; but evidence should be given as to how you acted upon documents which you have got in."

(*b*) For instance, Lieutenant De Horsey, who (*vide ante*, p. 123) had been in the island from the time of the first outbreak; and, on the other hand, being the naval Commander on the station, was quite unconnected with the island or its authorities. He stated that at the time he was of opinion that it would be necessary to take very strong measures, and to keep up martial law for a month, and he did not think that it had been retained at all too long. In comparison with the opinion of men in his position for observation, what was the worth of the opinions of men *not* present, and formed long after the event; moreover, the time could not have been shortened without the assent of another Council of War, and all the members were against it.

with the island, but had been present throughout the disturbances, concurred in the opinion of the Governor, that it was necessary to retain martial law for the period for which it had been proclaimed.

The best test as to the nature of the disturbances, and the danger they involved of a widespread and destructive rebellion, was, the opinion of those in the highest position and of longest residence in the island, that, but for the prompt and severe measures which had been applied, the white population would have been exterminated (*a*).

There were those examined as witnesses (*b*) who remem-

(*a*) The evidence was overwhelming, that such was the object of the blacks, and their enormous preponderance in numbers would have rendered their success certain, if they had once been allowed to use it in full force. See evidence of Mr. Westmorland. (Ev. of Salmon.) If it had not been for the prompt suppression of the rebellion the probability was that few whites would be now living in Jamaica. And Mr. Salmon said that, owing to the bad influences brought to bear upon the negro, and the bad advice given to him, it was the opinion of a large majority of the gentlemen of the country who knew the negro character, that the position of the whites was entirely unsafe. Under the influence of certain persons the negroes would do anything. They thought that everything was to be done for them, and if nothing was done they would be dissatisfied. Mr. Vickers, the Custos of Westmoreland, says that in that parish, which is larger than the whole island of Barbadoes, the discontent and disaffection were shown chiefly in the mountains among the small settlers who had freeholds of their own, and not among the labourers on estates. In the opinion of this witness, the insurrection, if it had not been promptly checked, would have extended over this large parish.

(*b*) The general measures adopted for the suppression of the rebellion were approved by Mr. Hosack, who confirmed the opinion—expressed by so many other witnesses—that the celerity and severity with which the outbreak was met by the military and naval authorities, saved the island from a general rebellion. Anything like a hesitating or a Fabian policy, said Mr. Hosack, would have been entirely fatal; and the prompt and vigorous measures which were taken alone prevented the most serious consequences. Witness was in the island during the rebellion in 1832; but he thought that the danger to the white people was infinitely greater last October than in the former rebellion. In 1832, Jamaica was well protected by regular troops. There were five white regiments in the island, besides a well-trained militia force of about 9,000 men, over 500 troopers, mounted on some of the best horses in the island, and the Maroons, who numbered 5,000. At that time (witness continued) martial law was imposed over the

bered a former insurrection in the same island, and declared the danger from the present one to have been far greater, and their belief was, that the measures which had been taken for the prompt suppression of the rebellion had saved the island from destruction; and that, had they been less prompt or severe, the island would have been lost.

And if any confirmation had been required of the soundness of the judgment formed by those who resided in the island, and were best acquainted with it, as to the disposition of the black population, and the existence of a wide-spread spirit of disaffection, it was afforded by their demeanour and conduct, even during the sittings of the Royal Commission (*a*), and the stringent acts of authority this conduct elicited.

whole island, although the rebellion was confined to the parish of St. James. Martial law was then maintained for six weeks, and it was succeeded by what was called "party law," a kind of semi-martial law imposed by special statute. For three months at that time witness was in charge of the Charlestown Maroons. In the present instance, Mr. Hosack was of opinion, that, with the information which the Government received, it was necessary to continue martial law during the thirty days prescribed by statute, even allowing that the Governor had the power, under the 9th of Victoria, to restore the civil authority during that period, which witness doubted. But the civil authority at the time was so disorganized and so weak in St. Thomas in the East that the ordinary tribunals could not have dealt with offenders. The witness was asked whether it would not have been possible to keep up martial law, supposing that to have been necessary, but to have decided that meanwhile no prisoners should have been executed by sentence of courts-martial? Witness said that this point was not raised, nor did he think that the ordinary tribunals could have dealt out punishment with the necessary promptitude and effect. Indeed, at first he thought that the amnesty proclamation was premature, and he had remonstrated with the Governor in that sense.

(*a*) Throughout the inquiry their demeanour was such as to show that, but for the terror still left of martial law, and the presence of the troops, they would break out into excess. The Governor (Storks) had been compelled to issue a notification to the people, warning them that, it having come to his knowledge that "threatening language is made use of in many parts of the country, tending to create alarm for personal safety, and for the security of property; and it being also well known, that certain reports are current, tending to mislead the labouring classes, and to create irritation and bad feeling amongst Her Majesty's subjects; his Excellency strongly

So far as regarded the first and fundamental head of the enquiry, the origin, nature, and circumstances of the disturbances, and especially whether they were rebellious, and how far they were, or threatened to be formidable, and of a character to require martial law (*a*); and how long, if they were of that character, the rebellious state continued.

The second head of the enquiry, the measures taken for the suppression of the "disturbances," and the conduct of those engaged in such suppression, involved—especially as to the latter branch—enquiry into the facts bearing on the conduct of the Governor in council in declaring martial law, though it would not, it is conceived (*b*), authorize the expression of opinion upon it.

reprobates the use of such threatening language, and the circulation of such reports, and declares that all the powers placed in his hands by Her Majesty will be used freely for the purpose of maintaining the law." In point of fact, witnesses attending the Commission were openly threatened and insulted, and the law on one occasion was openly defied by a large body of men, until the Governor had to order out the troops, and then, and not until then, under terror of military force, the peasantry submitted. The Governor thought it prudent to issue the following circular to the Custos or senior magistrate of each parish:—"Sir,—I am desired by his Excellency the Governor to request, that you will be so kind as to favour him, once in each week, with a report on the state of your parish, as regards the public feeling and tranquillity; and, should the slightest attempt be made to create any disturbance of the public peace, to despatch a special message with the information, direct to him."

(*a*) It will be observed that the Commission did not authorize any enquiry into the necessity for declaring or continuing martial law; unless, indeed, it is considered that, under the second head of enquiry, "measures taken for the suppression," it was open to the Commissioners to consider the propriety of declaring or continuing martial law. But that clause would appear rather to refer to the measures actually taken under martial law, not the declaration of martial law.

(*b*) The Commission might, in terms, authorise it, but, it is apprehended, it would not constitutionally authorise it. The enquiry, at all events, could not possibly involve any matters criminal in their nature, as affecting those whose conduct was assailed. For, even supposing that they had erred in their judgment in declaring, or continuing, martial law (assuming that to be within the scope of the enquiry) no amount of mere error in judgment, in an act such as that, could possibly involve a criminal liability. However, it might involve some amount of responsibility, and lay them

The enquiry into the "measures" taken for the suppression of the disturbance, would, of course, include, as a matter of fact, the declaration of martial law, though not, as a matter of opinion, the propriety of that step. Evidence was taken, therefore, showing that at a council it was unanimously resolved to declare martial law (*a*), and that martial law was accordingly proclaimed with strict legality. Evidence was also taken that martial law was continued for the period allowed by law; that is to say, for a month from that time (*b*).

Evidence was also taken as to the local extent of martial law, or the district as to which it was declared and applied; and it appeared that the Commander-in-Chief was always of opinion that the entire island should be de-

open to some extent of censure. It was very different as to the conduct of those *personally employed* in the measures of the suppression, which might or might not be criminal.

(*a*) (*Vide ante*, p. 46). "He had left the proclamation to be drawn up by the Attorney-General, to whom he constantly referred on any question of law. He had never heard any doubt expressed about the Governor's power, by the advice of his council, to proclaim martial law; on the contrary, there was a specific enactment authorising him to do so." (Evidence of Governor Eyre.)

(*b*) *Vide* evidence of Attorney-General, Mr. Salmon, Mr. Westmorland, Mr. Eyre, &c. The Attorney-General stated "there was not a dessentient voice. It was arranged that a proclamation of martial law should be issued, or at least declared, and I was requested to draft; I did so in accordance, I believe, with the law in Jamaica now in force. It was necessary that before the proclamation could be issued, it should have the sanction of 21 members of a Council of War, and the Governor succeeded in getting a Council of War; the next morning there was a full Council, twice twenty-one were present; it was then agreed that martial law should be proclaimed. It was first proposed to proclaim martial law over the county of Surry, but the result of the deliberations were that martial law should be proclaimed in Surry, Kingston excepted. There was no difference of opinion, every man agreed to proclaim martial law, and, in fact, some were for proclaiming it over the whole island. The discussions were, whether Kingston should be excepted, and certainly there was no opposition to the proposed step. I drew up the proclamation of martial law as Attorney-General, acting under orders—it was drawn up very hastily, in the presence of the Governor and General—I drew it under 9th Victoria, and acted under that act, which gives thirty days as the period of duration."

clared (*a*); but that the Governor was of opinion that it should be confined to the district in which the actual outbreak of rebellion had taken place, and that, on grounds of public convenience, the principal city should be excepted.

Reasons of policy and public convenience having prevented the Governor from putting that city under martial law, the Governor avowed that he had taken (*b*) upon himself the responsibility of directing the arrest of several persons there, for supposed complicity in the rebellion;

(*a*) Evidence of Governor Eyre, *et vide ante*, p. 298. The Governor stated that the only difference of opinion in the Council was as to the propriety of including Kingston. Mr. Eyre was very reluctant to bring upon the capital city and chief port of commerce so serious a trouble as the establishment, for any space of time, of martial law; and ultimately it was resolved that Kingston itself should be excluded, though the rest of the county of Surry, in which it is situated, should be proclaimed. His sole reason for not proclaiming martial law in Kingston, was the knowledge—which only those who have ever witnessed the operations of martial law can possess—of the inconvenience it causes among a commercial class, and of the evils which it must entail in any large community.

(*b*) The principal case was that of Gordon: (*vide ante* p. 181, *vide* part I.) Governor Eyre also stated that other persons were apprehended in districts not proclaimed, in pursuance of directions issued by him. In these cases, however, for reasons already explained, (*vide ante* p. 105) it is conceived they would be justified, if the parties had done anything to cause the rebellion. At this point Mr. Eyre desired to remind the Commission that at the time these arrests were made there were not more than a thousand soldiers in Jamaica, half of that number being engaged in the disturbed districts, while the other five hundred were needed for the defence of Kingston, Newcastle, Up Park Camp, and Spanish Town. Kingston was thought to be in danger; the whole island was in peril; but not a single soldier could be sent to any other part of the colony where fresh outbreaks might occur. He, therefore, believed himself justified in taking the most prompt and summary measures for suppressing the rebellion, and for punishing those concerned in it. Mr. Eyre preferred taking upon himself the whole responsibility of measures, about which there would have been no question had martial law not been proclaimed; trusting to an Act of Indemnity such as the Colonial Legislature has since passed. In reply to a question from Mr. Gurney, whether, from information since forthcoming, his Excellency could say that the effect of these arrests was to quiet apprehensions throughout the colony, Mr. Eyre replied that such had undoubtedly been the result. It is conceived that this question of the learned Commissioners went to the root of the matter, and put it in a right ground.

and he stated the grounds and reasons upon which he took those measures; which were the only, or the principal active operative measures, he took personally, upon his own responsibility.

Viewing the Commission constitutionally, it was an enquiry, on the part of the Secretary of State, in substitution for that which he would have had a right to carry on, as well as he could, by addressing interrogations to the officers engaged in the service, and demanding explanations from them, upon any matter which he deemed to require explanation (*a*).

The great object of the enquiry was to afford the Governor and the military Commanders the means of making orally those explanations which were required by the Crown, and which could not effectively be made by means of despatches at a distance; as to the manner (*b*) in which martial law had been carried out; and as to certain general statements in the despatches, which appeared to imply that the measures of martial law had been continued after actual insurrection had ceased, and directed with too much vigour and severity against those not engaged in actual insurrection.

The very institution of the enquiry, upon reports and

(*a*) The inconvenience of carrying on an enquiry in that way has already been pointed out as one of the reasons for the Commission. And the Crown would have the constitutional power to do in the one way that which it could do in the other. That is to say, it could thus demand explanations from its own officers.

(*b*) This seems the substance of the demands for explanation addressed by the Secretary of State to the Governor, either as to his own act, in continuing martial law, or the acts of the officers as to the particular measures taken. It was not suggested by the Secretary of State that martial law had been wrongly *declared*; the doubt suggested was only as to its having been so long *continued*. And as the despatches disclosed that martial law had been thus continued after actual insurrection had ceased, and carried out against those *not* in actual insurrection, and the Secretary of State declined to pronounce censure, but only instituted enquiry with a view to elicit explanation; this implied that there was not necessarily any ground for censure, and that such measures *might*, under such circumstances, be justifiable; otherwise it would have been idle to ask for explanation.

despatches, disclosing that these measures had been taken, implied, it is conceived, the recognition, on the part of the Government, of that which it has been the object of these pages to establish; that the measures of martial law may be applied or continued in a state of rebellion, as distinct from actual insurrection (*a*), and as against rebels, *not* at the time in actual insurrection; and that, for any errors or excesses, those honestly engaged in such measures are not legally liable, but are only responsible to the Crown.

It is to be observed that, *à priori*, the constitutional scope of the enquiry being to inform the conscience of the Crown, in matters which could not be made the subject of legal prosecution, it would follow that the scope of the enquiry would be limited (*b*) to the measures taken in suppression of the disturbances, whether or not strictly in

(*a*) For as the despatches and reports distinctly disclosed that such measures *had* been so continued and applied, and this was the main ground upon which explanations had been asked, which it was the great object of the enquiry to elicit; this implied that explanations *might* be given, and that circumstances might be disclosed in evidence, which would show that the continuance and application of these measures, *although* actual insurrection had ceased, and as against persons *not* then in actual insurrection had been justifiable, otherwise it is obvious the enquiry would have been idle, and the Secretary of State might at once have pronounced a censure. On the other hand, if such measures were illegal and unjustifiable, and the parties implicated were legally responsible, then the institution of an extraordinary Commission of Enquiry would have been obviously unconstitutional and unjust, for it would have been a *fishing* inquisition in aid of criminal prosecutions, against servants of the Crown, for their conduct on an occasion of great public peril and emergency.

(*b*) As already shown (*vide ante*, p. 270), it would only be matters done, whether wrongly or erroneously, yet done under military orders, in carrying out martial law, which would be strictly done under, or in execution of, martial law, which would be protected by the common law, and only those acts which were done in the suppression, which would be covered by the bill of indemnity (*vide ante*, p. 230); and hence it would be only as to these an enquiry by Royal Commission would be either necessary or constitutional; and accordingly the Commission carefully recites, as its ground and reason, that it is complained that "excessive severity" had been used in the suppression, that is, that measures had been taken in suppression of the rebellion which were excessive in severity.

carrying out martial law, that is, under military orders; but it would not properly extend to acts, if any, not really done in the suppression, although during martial law, and perhaps under colour of it.

The assumption seemed necessarily to underlie the whole enquiry, that the measures taken might, at all events, possibly be lawful. But they could not (*a*) *possibly* be so (with scarcely the most insignificant exceptions), except upon the hypothesis that martial law had been established, which would make all measures taken under military orders and authority, at all events *primâ facie* lawful, and also presumably, though not necessarily or conclusively, justifiable, in a moral as well as legal point of view.

The recitals and terms of the Commission plainly implied that, so far as the enquiry was to have regard to the measures taken for the suppression of the rebellion, they were not illegal; for it was pointed, not at illegality, but at excess. The ground assigned was the allegation of excessive and unlawful severity, *i.e.*, severity unlawful by reason of excess (*b*), whereas all the measures taken were

(*a*) Except as to the few negroes killed in the act of the felonious attack on the house of one Duffus, and except the few killed in an actual encounter with the Maroons under Colonel Fyfe. These were the only instances in which the infliction of death would have been justifiable, at common law, by the military acting merely in aid of the civil power, for their power at common law is strictly limited to resisting or repressing actual outrage, or to the effecting of an arrest for felony. These instances would hardly amount to the odd units in a total of 438 negroes killed or wounded in the course of the suppression. And all but that half-dozen or so had been, in a legal sense, murdered, unless martial law had been lawfully established, in the sense in which it has been here expounded.

(*b*) This was the more remarkable, because there were the loudest denials of the existence of any rebellion, or of any necessity for martial law at all, and it was likewise maintained, with the sanction of a legal opinion, that even if martial law had been lawfully declared, it would warrant no more than repression of actual disturbances, and not the punishment of outrages or acts of rebellion already committed, for which reason it was insisted that all the courts-martial that sat were illegal, and without lawful authority, and all the military executions, save any that occurred in actual encounter, illegal acts of homicide. Not the least notice was taken of these allegations, and the word "illegal" was carefully kept out of the

illegal, unless there was a legal power to declare martial law, in the sense in which it has been here explained.

It may be assumed, from the known and published opinion of the Judge-Advocate-General (*a*), and from the terms and scope of the Commission, and from the course of proceeding adopted by the Commissioners, that the Government considered that, for the measures taken, however erroneously (if honestly, and not maliciously), in declaring, or carrying out (under military orders) martial law, the Governor or the military Commanders would not be legally or criminally liable.

The very institution of the enquiry showed that the measures taken, so far as disclosed on the face of the military reports, were not either legally criminal, nor even necessarily censurable; for, in the former case, it is to be presumed that they would have been left to legal prosecution;

Commission, and the word "unlawful" was only used along with the word excessive, with reference to degree of severity, "excessive and unlawful severity," words which would be very ill chosen, if *all* the executions, floggings, and burnings were illegal, as illegal they would have been, unless martial law was legally established, and meant what has been here maintained.

(*a*). *Vide ante*, p. 108. The gentleman who had given that opinion was still Advocate-General, and the opinion had been published the very day after a contrary view had been put forth, as though to mark the adherence of the Government to it; and it would be, it is conceived, impossible to reconcile with it, or with the authorities already elaborately stated (*vide ante*, p. 90), to suppose that the Governor, or the military Commanders, who had honestly declared or carried out martial law, could be put to justify their measures in a court of law. The consequence of such a monstrous doctrine, of course, would be that no Governor would ever venture to declare martial law, and no military Commander would ever venture to act upon it. The only *dictum*, apparently, in favour of this view, extracted from a former Judge-Advocate-General (Sir D. Dundas, before the Ceylon Committee, 1849), to the effect that an officer would be responsible, under martial law, just as a man is who shoots a man he supposes to be a robber, if he turns out not to be so, is obviously erroneous, on the double ground that it mistakes the common law in the case supposed (for the man would *not* be so liable, if the appearances might naturally lead him to suppose it *was* a robber), and next, it confounds what a man may or may not do at common law, with what he may do under martial law.

and, in the latter case (*a*), it is to be presumed that the Secretary of State would at once have pronounced a censure upon them, as he was pressed to do, instead of which he emphatically and repeatedly declared that he did not censure or prejudge.

The terms (*b*), "excessive and unlawful *severity*" would be strangely inapplicable to measures wholly unlawful, especially when those measures consisted not only of the burning of houses and flogging of men; but of the *execution* of men on summary enquiry, or of civilians under sentence of courts-martial; acts necessarily illegal; and, in cases of capital executions, in a legal sense, acts of

(*a*) The despatches which had already passed between the Secretary of State and the Governor sufficiently showed this to be so. The Secretary of State was strongly pressed to censure the officers, but he distinctly declined to do so; and, so far from doing so, he, on the contrary, acknowledged their services. And, though this did not commit him to approval of all acts they had committed or sanctioned, it certainly implied a general approval of their measures, so far as they appeared, as their general character did, on the face of these reports, with the exception of the matters specifically pointed out, and these were only pointed out as requiring further explanation, not as necessarily deserving even of censure. It plainly appeared that all the officers, and the Governor himself, had taken substantially the same measures, although some might appear to have carried them somewhat further than others, or to have reported them in a spirit less considerate. Still, it appeared on the face of the despatches, that all of them had attacked or executed men not found in actual insurrection, or committal of acts of outrage, and this was wholly illegal at common law. (*Vide ante*, Part I.) This, then, implied a recognition of the legality of martial law.

(*b*) If a man who might lawfully be arrested was flogged—that would not be a case of excess; the flogging would be wholly illegal. It would not be like the case of an excessive flogging, but like the case of a constable who, having legal authority to arrest a person, beats him with his staff; which is a wholly illegal act. (*Oakes* v. *Wood*, 2 M. & W.) So, if a man is unlawfully shot or hanged, it is absurd to call that excess, or even unlawful excess, or "excessive and unlawful severity;" all these phrases are simply absurd, applied to such an act, which is, legally, murder. And as the military, when acting in aid of the civil power, at common law, cannot *execute* any one, all the executions were legally murders; unless martial law means, what it has been explained to mean in these pages; in which case, they were all *lawful*, though they might be culpable.

murder, unless martial law, in the sense in which it has been explained in these pages, had been legally established.

The enquiry, it is conceived, was pointed to "excessive severities," (*a*) mainly with reference to considerations of humanity; and though the word "unlawful" was added, that, it is conceived, had no reference to the one or two cases (*b*), in which—as it is apprehended erroneously—it had been supposed that the legality of the course taken was questionable.

In one point of view, if the measures taken were unlawful, they would *all* be excessive; but, as already observed, the Commission, by pointing its enquiry to measures excessive severity, appeared to imply their *legality*; and the real truth was that (*c*), unless they were *all* legal (that is, all that were taken under military authority), they would none of them be legal; and if any of them were legal, *all* would be so.

The question of excess, however, would be material, with reference to the moral character of the conduct of those concerned (*d*), whether the measures taken were law-

(*a*) *Vide ante*, p. 304. "Excessive" seems to imply general legality, and so do the expressions used in the despatch of the Secretary of State (*vide ante*, p. 244); except as to Gordon's case, and one or two cases pointed out as exceptional. It is absurd, however, to use the phrase "excessive," as applied to measures altogether illegal.

(*b*) *Vide ante*, p. 236. As to Gordon's case, and as to the trials by court-martial (*vide post*).

(*c*) Because, in hardly any instance were men killed in the act of felonious violence, certainly not more than one or two, the instances of the attack on the mob at Duffus's, and the encounter with the Maroons. So that all the rest of the acts committed, all the executions, all the floggings, all the burnings, as they were illegal at common law, so they could only be justified by martial law. On the other hand (speaking, be it observed, of things done under military orders), if *any* of them were lawful, for the same reason, all of them must have been so, for all were equally done under martial law, and by military authority. Still, many of them might be censurable.

(*d*) That is, their having acted honestly with a view to the suppression of the rebellion, and having also acted with as much consideration and humanity, as, under all the circumstances, could fairly be expected from

ful or unlawful, for the question of lawfulness or unlawfulness, depending upon considerations purely legal, and sometimes it may be somewhat strict and technical, it would be the moral character of the proceedings which would be the real substantial question, even assuming them not to be lawful.

It will have been seen (*a*), that the Secretary of State had addressed to the Governor certain demands for information or explanation, which would form the basis of the instructions as to the enquiry to be pursued. These demands had first been pointed to particular passages in the reports which appeared to require explanation. But upon further consideration, it appeared to the Secretary of State, that these particular questions resolved themselves into questions of a more general character (*b*), as to the measures to be taken under martial law, and he therefore had addressed to the Governor (*c*), a series of general enquiries, as to the nature and extent of the measures which had been adopted in the suppression of the rebellion, and these formed the principal basis of the enquiry.

Setting aside some circumstances, it appeared that, in substance, the measures taken by all the officers engaged in the suppression (*d*) were the same, and were such as were

men acting in such an emergency. Their, taking some care to distinguish degrees of guilt proved, would be the best proof of this, and this was shown, beyond a doubt, in many ways. A minority of those captured were executed; the great majority were only flogged, many were released. This of itself showed that the executions were not reckless. No one was executed merely for having plunder, but only upon proof of having *plundered* or taken part in the rebellion, and so on.

(*a*) *Vide ante*, p. 234, p. 241.

(*b*) *Vide ante*, p. 244.

(*c*) For it appeared that, discarding such circumstances as went to the propriety or humanity of the acts done, all the officers, and the General himself, had taken substantially the same measures, at all events, in all respects that concerned their legality, and had stated these measures in substantially the same general terms, although in one or two instances, in a tone and spirit which caused greater dissatisfaction than in others (*vide post*).

(*d*) Discarding mere circumstances of this kind, this appeared to be,

ordered, directed, or approved of by the General; and that they were such military measures as, in his view, and that of the Commander-in-Chief, were authorised by the declaration of martial law, to be taken against rebels or insurgents, whether taken actually in arms or not, if actually engaged in the rebellion, and considered to be in hostility.

In substance, they all admitted such acts and measures as had raised the important general questions raised by the Secretary of State, founded on their own reports, which, in this respect, will be found substantially the same. It is manifest, that as the scope of this work is the measures which may be taken under martial law, and which actually were taken under military orders and authority, it has to do, not so much, if at all, with measures and acts *disavowed* by the officers, as with acts and measures which they avowed, and admitted, and justified, by their orders, or by the nature of martial law, or the usages of the service (*a*), and as to which there was little, if anything, which could affect their legality, which was not *disavowed* by the military authorities.

And it was obvious that the *lawfulness* of their measures must depend upon some general authority, and that

in effect, the case; all the officers had attacked bodies of men who might be supposed to be in arms, or to be actively engaged in the rebellion, as they might be, though they never had arms in their hands (as, by firing houses and committing such acts of devastation, or aiding those who had arms), and captured as many of them as they could. All of them executed such as they were satisfied had been actively engaged in the rebellion, whether found with arms *in their hands* or not; as much of the mischief might be, and was, done without arms; all of them burned huts, in which plunder was found. All of them inflicted floggings, in cases in which only the possession of plunder was proved, and not the participation in *acts* of plunder or outrage. And all these acts were illegal, unless lawful by martial law.

(*a*) Which alone, as already has been observed, (*vide ante*, p. 90), would be covered by the protection afforded, as is conceived, by the law, to the execution of martial law. The scope of this work is, the measures taken and acts done by military order and authority, which, therefore, excludes acts denied and disavowed by the officers, and also acts done without order and not approved, and acts, if any, disapproved of by the supreme military authority, the General in command.

this authority could only be conveyed by the declaration of martial law, as hardly any of them could possibly be justified at common law (*a*); and, on the other hand, if the declaration of martial law *legally* justified *any* of them, then it must equally have justified (*i.e. legally*) *all* of them, so far as they were measures taken substantially under the same conditions, and in accordance with the authority purporting to be conveyed by the declaration of martial law.

The substance of the enquiry was, as to the excessive exercise of a discretionary military power. To establish a discretionary power, however, it would be necessary to establish *the legality* of the power, and hence the basis of the enquiry would be the *legality* of the measures taken, which must depend upon the effect of the declaration of martial law (assuming its legality, which was abundantly established), and the effect of that was (*b*) to establish in the military a discretionary authority to act, as in war, against all of those whom *they might consider* opposed to the Government and its loyal subjects.

If the declaration of martial law had any real legal operation to effect, and was anything more than a mere empty form (in which view, all the measures taken, with hardly one exception, were obviously illegal, and an enquiry into "excess" would be almost an absurdity), then

(*a*) As already has been amply shown in Part I., at common law, the power of the military in aid of the civil power is accurately defined in the opinions cited (*ante*, p. 254), and it is strictly limited to the resistance of outrage, or the suppression of actual disturbance, or the arrest of offenders. There is no such thing as summary punishment at common law (unless it happens in resistance); and although a man is seen to commit a murder, all that can be done is to arrest him, though he may be killed if he resists.

(*b*) *Vide ante*, p. 127. It declared that martial law should prevail, and that the military should have all the power of exercising the rights of belligerents against such of the inhabitants as *they might consider* opposed to the Government, and the well-being of its loyal subjects. That is, that the *military* should be at liberty to exercise the powers and use the measures of war. And further, the most unlimited discretion was vested in the military, as to the measures to be taken.

it established a definite power (*a*), called martial law, for a definite period of time, during which the officers were authorized to use measures of war at their discretion, against all they considered to be rebels.

In the *exercise* of this power, no doubt, the officers entrusted with its actual execution had, as their orders were general, necessarily to exercise a discretion (*b*), as to matters of actual number or degree, but then, it was a discretion which, it appeared, they regarded as regulated and governed, not by considerations of present, instant, visible necessity, but by considerations of military duty and authority, their duty being, as they deemed, to carry out martial law under military authority.

Assuming the legality of the declaration of martial law, then the measures taken and acts done under military authority, or in the honest pursuance of military orders, would be lawful, supposing that, as to the measures taken, they were such as might be measures of war; and supposing as to the acts done, that they were such as might be done in

(*a*) That seems to be the best word to express the effect of martial law. It is not so much a law as a power, stronger than, though including in it, all law, municipal or military, authorizing all that may be done under ordinary military law, and much more, because embodying all that absolute military power, which may be exercised by prerogative in time of war, and which only requires statutable authority in time of peace, and of which only a *portion* is embodied in the statutable enactments to the Mutiny Acts.

(*b*) It did not, of course follow, nor did any of them contend that because they had power under the proclamation of martial law, to attack bodies of men who kept aloof and were in apparent hostility, that, therefore, they should always under all circumstances do so, or do so rashly, heedlessly, or inconsiderately; nor, because they had power to execute prisoners, if satisfied, on summary enquiry, that they were guilty, that therefore they should do so hastily or carelessly; nor, because they had power to burn huts in which plunder was found, did it follow that they were to do so recklessly, without any regard to the shelter of women or children; nor, because they had power to inflict floggings for plunder, &c., did it follow that they were to do so excessively or cruelly. In a word, they were not, and did not suggest that they were, at liberty to discard considerations of humanity. On the other hand, they were certainly not restricted to act upon *necessity*, in the narrow sense of instant, present necessity.

carrying out those measures (*a*). As to such measures and such acts, it is apprehended the common law is suspended.

Now, under the declaration of martial law, according to the principles already laid down, the military, that is (*b*), under military orders and authority, would have the right to use all the measures of war against all whom they should consider rebels (*c*). And the evidence, in substance, came to this (so far as regarded the measures taken or acts done under military order or direction), that such measures were taken against all whom they considered rebels.

So far as regarded the question of *legality*, it is conceived that, as the declaration of martial law in terms authorized the military to use measures of war against those *they considered* to be in hostility, the only question would be whether they, *in fact*, so considered (*d*) those

(*a*) This seems the doctrine laid down by the Judge-Advocate-General in 1850, in the Ceylon case (*vide ante*). And as it is difficult to define a case which might not be a measure or an act of war, it is, no doubt, difficult to define a case in which a measure taken, or an act done, under military authority, that is, in carrying out military orders during martial law, could be deemed unlawful and criminal, otherwise, it is obvious, there would be no safety in acting under martial law. This does not apply to acts done during martial law, but not under it, *i.e.*, not in carrying out measures directed by military authority or military orders, but voluntarily; such acts may, indeed, be justifiable, but it is not by martial law.

(*b*) As already pointed out, this would only extend to acts done under military orders; acts not done under orders, must either be justified at common law, or be the subject of a bill of indemnity. Nothing is more manifest than that martial law means military authority (*vide ante*, p. 90).

(*c*) That is, all the measures which, even admitted and avowed, as already observed, it is with these alone this work has any concern. And if so taken honestly, however erroneously, against men considered, however erroneously, to be in hostility, it is conceived that they would be lawful, though they might still be censurable, on considerations of propriety and humanity, or rashness, or carelessness, or undue precipitation, &c. And these considerations formed the scope of the Commission.

(*d*) Whether rightly or wrongly, wisely or erroneously, if they, as a matter of fact, honestly and really so considered, for it would never do to make men's justification in the exercise of a wide, discretionary authority like this to depend upon the accuracy of their judgment, or the degree of their wisdom, it would be contrary to all legal principle to do so. Men are never held liable for errors of judgment, unless the authority is *definite*, so

against whom they so acted to be in hostility. So far as regarded the question of propriety, it would be whether they used, under the circumstances, reasonable care to satisfy themselves, or acted according to the rules and usages of the service.

Assuming, as the General in command and the officers assumed, and as it is conceived they would be entitled to assume (*a*), the legality of the declaration of martial law, they would be legally justified in all measures taken under military authority, such as could possibly be used in war, and in war, not against honourable enemies, who have belligerent rights, but against rebels, who have no such rights.

What, therefore, those who have engaged in the suppression of the rebellion had to look to was, the orders and directions of the supreme military authority (*b*), and which they were not only authorized, but obliged to carry out, to

that excess must be wilful, or at least conscious. But there may, it is manifest, be a great amount of excess, in fact, caused by errors, hardly even censurable, still less culpable, when the authority to be exercised is necessarily wide, vague, and discretionary. Then the question is, it is conceived, so far as regards *legality*, did the party, in *point of fact*, intend to pursue it?

(*a*) *Vide ante*, pp. 55, 74. If the General in command, and the officers under him, were responsible for the legality of this fundamental act, it is obvious that no military man would ever act under martial law at all. It is conceived that acts such as this prove their own legality, like all acts of State, provided they are such as are within the competence of the authorities who do them, otherwise there would be no security for those who act under their authority. Now, it is within the competence of the Crown, or of a Governor or Viceroy, to declare martial law; and it is conceived that, if he does so, that legalizes acts under it, even although he may be censurable by the Crown for the act.

(*b*) In the emphatic words of the Duke of Wellington, "The will of the commanding officer." (*Vide ante*, p. 109.) Whatever he directed, authorized, or approved of, would, under martial law, be lawful, otherwise it would be impossible for the officers to know what was lawful, and they would be afraid to act at all. It must never be lost sight of, that martial law necessarily involves far more than mere resistance to actual insurrection, for that may be done at common law (*vide ante*, p. 29), and the declaration of martial law involves far more than common law.

the best of their judgment or discretion, according to the rules or usages of the service. If they had anything else to consider or regard, they could not act with safety.

The Secretary of State knew that the declaration of martial law authorized military measures against such as the military considered hostile. He desired to know what measures they adopted, and to what extent, and whom they considered hostile.

These enquiries were pointed to facts, and expressed no opinion, and their object appeared to be to elicit, not only information as to numbers, but, what would be far more important, what rules or principles, if any, had been adopted, and either embodied in instructions to the officers, or otherwise (*a*), so as to guide them in the execution of martial law, and especially as to the principle upon which men were attacked and shot in the field, or summarily executed, who were not found in arms, or in actual resistance.

These enquiries appeared to imply that martial law was in force, and that such measures might be lawfully taken. Even assuming that these demands were pointed at the legality, and not, as it is conceived they were, rather at the humanity or propriety of these measures (*b*), the very

(*a*) It would, of course, require no instructions, nor any authority, under martial law, or otherwise, to enable the military to attack bodies of armed men, who attacked or threatened them. The question would be as to their attacking those who did not threaten or attack, and the Secretary of State desired to know on what evidences or appearances, *other* than hostile action or attitude, men were dealt with as rebels, and whether those attacked were resisting or armed. (*Vide ante*, p. 244.) It is obvious that the answer to these enquiries must necessarily depend upon the nature of the warfare pursued by the rebels. On the other hand, it is to be observed that the military, acting in aid of the civil power at common law, could not lawfully inflict death, except necessarily in conflict, or in resistance, or effecting an arrest; and that there never can be a necessity, in this sense, for punishment, so that they could never, except under martial law, inflict death on a prisoner even found in arms, or taken in conflict, or in the act of committing murder. The despatch, therefore, implied that martial law was in force.

(*b*) Their whole tenor appeared to be directed rather to excess than

demand for explanation appeared to imply that there might be circumstances which would justify the attack upon bodies of men who were not actually in resistance, or even in arms, and their summary execution, when taken as prisoners, if proved to have been active in the rebellion; otherwise, as the reports abundantly disclosed that there had been such attacks and executions, the demand for explanation would have been futile.

The whole tone and tenor of the Secretary of State's despatch (*a*) implied plainly that summary severities might be justified in the suppression of the rebellion, which could not be justified, either in the action of the military in aid of the civil power, at common law, or under the laws of war, in regular warfare; for it implied that executions might lawfully take place, on trial by court-martial, or on more summary enquiry, on proof of actual complicity in the rebellion, or that rebels might be, not only attacked, but executed, if found in arms, or in actual hostility.

legality. Hence they were pointed, first, to the numbers of those executed, and next, to the rules or principles by which the numbers had been practically regulated. If no rebels could be attacked or executed who were not in actual resistance, or in arms for the purpose of armed resistance, then hardly any of those who had been lawfully attacked or executed. But, on the other hand, it would be obvious to the Secretary of State, that men might be committing acts of hostility and devastation, without the use of arms; and that, if they kept out of the reach of the military, so that they could not be arrested, they could only be attacked at a distance, by firing on them.

(*a*) As to this, *vide ante*, p. 244. It is hardly necessary to repeat that, by common law, rebels can only be killed, if it is absolutely necessary and unavoidable, either in resisting their attack, or in dispersing them, or in arresting them; but that, if it is possible, they can only be arrested in order that they may be regularly tried. And it is hardly necessary to say that, by the law of war, in regular warfare, not only are soldiers not liable to be executed if taken in arms, but, on the contrary, the being taken in arms and in regular warfare, rather entitles them to be treated as prisoners of war, and reserved for exchange or release; and it is, if anything, the being taken *not* in arms, but in acts of private depredation, arson, or robbery, not under military orders, but as marauders and stragglers, which renders them liable to be shot, or otherwise executed. And the Secretary of State plainly implies that rebels so taken might be so dealt with.

The primary question would be as to the lawfulness or legality of these acts (*a*), but the enquiry by the Crown would have a far wider scope than bare legality. Acts might be lawful and yet censurable, and even culpable, though they could not possibly be criminal. There might be an immense amount of excess—in what was lawful—excess not even censurable, still less culpable, arising from false information, exaggerated alarm, apprehension, or the exigencies and excitement of the time, &c. All this, and the *facts* showing or excusing it, would be within the enquiry.

The enquiry would be into *facts*, but every enquiry into facts must necessarily have reference to some objects of enquiry, as facts relevant with reference to one object of enquiry may be wholly irrelevant as to another. The scope of the enquiry, it will be seen, would be larger than the *legality* of the "measures taken," or of the "conduct of those engaged in the suppression, for it would also embrace their *propriety*. Measures taken might be legal, yet censurable, and the conduct of those engaged might be lawful (*b*) and yet culpable; though, if in persuance of orders, or in exercise of lawful military authority, they could not, under martial law, be illegal or *criminal*. And there might be a great degree of excessive severity, which in a sense would be unlawful, though it would not be criminal.

(*a*) It has already been shown, that mere excess in the exercise of a discretionary power (that is supposing its exercise honestly directed, however erroneously, to its real object, and not the result of indirect motives or ends, unconnected with the suppression of the rebellion) would not make the whole proceeding unlawful, that is, would not take away the authority. And, as in the case of martial law, the authority, so long as martial law exists, is discretionary and continuing, the mere fact of the acts being excessive, honestly though censurably, would not make them unlawful.

(*b*) As already shewn (*vide ante*, p. 310), excess does not render acts done under lawful authority illegal, unless the excess is wilful, or consciously wrong, as it is in cases at common law, but not so under martial law, where the power is not definite but discretionary, and there may be an immense amount of excess caused by error of judgment, false information and exaggerated apprehensions, &c. not *necessarily* even culpable, and certainly not criminal.

In short, it seems that as the true scope of the Commission was to inform the conscience of the Crown as to the conduct of its officers in the discharge of their duty, which could hardly be wholly unlawful, though some excessive severity might be, but might be culpable, though lawful, and censurable, though not criminal; the true scope of the enquiry, under this head, was rather the moral (*a*) than the legal aspect of their conduct.

The same conclusion would appear to result from the terms in which the Secretary of State himself (*b*) in his despatch, announcing to the Governor his intention to institute the enquiry, indicated its scope and province, which appeared to be directed entirely to the moral character of the proceedings, and to the question of approval or disapproval of the conduct of the officers of the Crown in the discharge of their duty.

The scope of this work is the legality, rather than the propriety, of the measures taken under martial law (*c*), but it is conceived that it is part of the law of the subject, that the propriety of the measures taken or

(*a*) This would explain the introduction of a vast amount of evidence otherwise wholly irrelevant.

(*b*) Despatch of Mr. Cardwell.—"In conclusion, I will only repeat, on the part of Her Majesty's Government, that, while we feel it to be our imperative duty to institute this enquiry, we desire by every means in our power to guard against in any way prejudging its result. Our earnest hope is that the result will be to satisfy us on the points on which it is necessary for us to be satisfied, and at the same time to exhibit the conduct of those whose duty has compelled them to take part in those proceedings, and to whom the suppression of the outbreak is due, in a light consistent with their position and character, and especially, in your own case, with that high character for courage and humanity for which you have always been distingnished." The phrase "character" clearly points to the humanity and propriety of the measures taken, not their absolute legality.

(*c*) The two questions are practically connected in this way; that those who believed the measures taken, or acts done, to be illegal, would be very apt to think them unjustifiable and morally wrong; certainly would be more easily induced to think them so, whereas, all would admit that the presumption is in favour of the exercise of lawful authority, especially when it is in its nature discretionary.

the conduct of those engaged in them, would, assuming their legality, properly be a matter of military judgment (*a*).

And assuming the legality of the declaration of martial law, as it in terms established a discretionary military authority, it is conceived that not only it legally justified all acts under military authority (except such, if any, as could not *possibly* be justified), but that the exercise of such discretionary authority could not properly be reviewed by any tribunal, not military (*b*).

The Secretary of State, by his enquiries, addressed, as they were, either through the Governor or through the Commissioners, to the military officers themselves, showed his sense that the considerations, even of propriety and humanity, to which, it is conceived, they were mainly directed, must depend a good deal on military considerations (*c*); upon considerations arising out of circumstances,

(*a*) As the House of Lords held in *Sutton* v. *Johnston*, in case of war.

(*b*) The reasons given for this, in the judgment of Lord Mansfield, in *Sutton* v. *Johnston*, 1 T.R., equally apply to any enquiry, for the measures to be taken must necessarily depend on the judgment to be formed at the moment, under the circumstances, and with the information, and the means of observation then attainable, and the impressions then derived, true or false, right or wrong; so that measures taken to-day with perfect propriety may to-morrow turn out to have been wrong in fact; and severities which to-day seem necessary or expedient, may to-morrow be found to have been in *fact* excessive, but without the least blame to those who directed the measures, so that an enquiry long afterwards, even a military enquiry, may be unfair, and other than a military one, must be so.

(*c*) Measures, it is manifest, might, to laymen, and after the event, and at a distance, especially as described in hastily written reports, appear to have been unnecessary and inhuman; which at the time, to military men, and under the circumstances and appearances by which they were surrounded, might have appeared very necessary and prudent. And it is obvious also, that as the humanity and propriety would depend upon the necessity or expediency, so that is a necessity or expediency in a military point of view at the moment, and under the circumstances and appearances of the time and place. And a measure might appear, and on the circumstances *as they appeared*, might be, in a military point of view, necessary and expedient, which might, in *fact*, as it afterwards *turned out*, have been unnecessary; in which case it is obvious, that the real facts or ultimate results could not possibly affect the propriety of the acts.

as they appeared to the officers themselves at the time, not as they turned out in the event to be. And therefore it was, that he afforded them the opportunity of offering these explanations.

The measures to be taken under martial law were military measures, to be taken entirely under the military authority. This would result, necessarily, from the declaration of martial law, which, in terms, declared (*a*) that the military forces should have the power of exercising the rights of belligerents against such of the inhabitants as the *military forces* might consider opposed to the Government, and the well-being of its loyal subjects. The nature of the measures, and against whom they should be taken, rested entirely with the supreme military authorities.

The primary enquiry of the Secretary of State had been as to any general instructions issued to the officers as to the manner in which they should carry out martial law. The first enquiry under this head was the measures taken, which would be the measures directed by those in supreme military authority. The first question, then, would be, as to the supreme authority under martial law (*b*), as to which

(*a*) The officers, therefore, who were engaged in the suppression had to take for their guidance the orders given, or measures expressly or implicitly directed, by the Geneарl, the supreme military authority. It was not for them *merely* to act according to their own idea of present necessity in their judgment, though no doubt that might guide them as to measure and degree, and manner of action; but they had to act under the direction of a supreme military authority, who had to consider necessity in a far larger sense, and with reference to the position of the whole district, and in some respects of the whole island. And as long as he sanctioned measures of severity, it was not for them to stop them. Nor was it a question of necessity in that narrow sense of the word at all, as it is at common law, when the military are merely acting in aid of the civil power; but of expediency, with a view to the general object of putting down the rebellion.

(*b*) Thus the Attorney-General stated that the Governor has instructions as Captain-General, but the Governor makes the requisition for troops, and the General carries it out in detail. "I am of opinion that the Governor was the supreme authority during martial law—my opinion is, that as soon as the Governor gave orders to the General to go to the proclaimed districts, the

it appeared clearly, both upon legal and military authority, as would also be clear upon principle, that the supreme authority was the General in command of the forces in the field; and any orders or instructions would properly emanate from him.

Upon this fundamental point, as to the supreme authority, under martial law (*a*), the evidence of the General in command showed that *he* considered himself invested with supreme authority in the declared district, and took such measures, whether in the field or by court-martial, as he deemed proper, though no doubt receiving the suggestions of the Governor. And the evidence of the Governor (*b*) was to the same effect.

Governor was relieved of the personal responsibility, and that he handed over the districts in question to the military. I regard the General in the field as being the supreme military authority." Though the Commander-in-Chief, General O'Connor, spoke of it as a question on which lawyers were divided, his own conduct showed that he did not deem it doubtful, for he and the General in command within the district, declined to try prisoners by court-martial, whom the Governor *desired* to be so tried, but whom they considered not to be within their jurisdiction. (*Vide ante*, p. 174.) This was the view taken by the General in command, and it seems clear upon principle; for martial law being a state of war, who should be supreme in the district but the military commander? That seems the nature of martial law. The Governor, no doubt, is supreme as to *declaring* martial law, and as to the general disposition of troops on the island, but as to particular military measures the *General* is supreme. (*Vide ante*, p. 128.)

(*a*) Thus, General Nelson said:—"Having made all arrangements, I went into the town of Port Antonio, as an attack was expected from that quarter. Some rebels were executed at Port Antonio, which place, as well as Morant Bay, *I considered in possession of the enemy*. Being engaged in making military arrangements, I *did not issue any orders* for the mode of carrying out executions till the 22nd. His Excellency said, after proposing certain steps, 'I shall be happy to make or facilitate any additional arrangements which the Brigadier-General may consider desirable.' I did not carry out all the proposed arrangements, *because I considered that I, being in command of the troops, was responsible for all military dispositions.* I gave no directions to any one, as to how they were to act during martial law, as I understood that the supreme power was vested in the military.'"

(*b*) Thus, Governor Eyre stated in his evidence, that he had given no directions; but he laid down, for the guidance of the officer in command, a statement of the general policy to be pursued, and so long as he was with the troops, he directed most of their operations. During that

As the declaration of martial law authorized the military to take the measures of war, against those whom they might consider opposed to the Government, all such measures of war became lawful, and the question, what *were* measures of war, and who were to be considered as rebels, were necessarily military questions, to be governed either by express orders and direction of the General, or by the usages of the service in like cases (*a*).

In the view of the General in command, it was manifest that, under martial law, the rule of action was far more definite than mere necessity (*b*), with reference to actual resistance, which would involve no more than might be done at common law, unless it was taken, not in that

period he saw the greater number of the reports furnished by the officers commanding datachments; but he had seen very few since, and all he had received had been sent to her Majesty's Government. Mr. Eyre stated he gave Brigadier Nelson a memorandum of the stations which he thought it most desirable to occupy, and added a recommendation, that the Maroons should scour the hills and cultivated settlements, and drive in, capture, or cut off the leading rebels—a step which he considered necessary before an amnesty could be declared. (*Vide ante*, p. 135.)

(*a*) This was evidently the view taken by the gallant President of the Commission, for, in the examination of one of the officers, he put this as the governing question, "During the time your detachment was out, were they brought under control according to the usages of the service?" (Ev. of Lieut. Adcock). That is, were they kept under orders, as for instance, in regard to firing, which should only be under orders, and so as to other matters. It appeared from this that, in the view of Sir H. Storks, the *usages of the service*, coupled with military orders, formed the only rule. And it is conceived that this, which is the view to be found laid down in *Simmons on Court Martial*, was the true view, and that therefore the question of the propriety of the measures taken, was, at all events, primarily, a matter of military judgment. (*Vide ante*, p. 316.)

(*b*) At common law, this is confined to self-defence, or the resistance of actual outrage, or the arrest of offenders. An officer, in arresting a man on a charge of felony, may, if he resists or flies, and if it is necessary to defend himself, or prevent the flight, may kill him, and if it is *necessary* to *prevent* an act of felony, any one may kill another. But necessity, in this sense, is strictly limited, and in that sense, of course, it never could be necessary to kill a rebel, except in combat, or to execute any one on sentence by court-martial, or to have a court-martial at all. But the General himself did those things, and approved of such acts by the officers.

narrow sense, not of necessity present and imminent, but the larger sense of necessity with reference to the suppression of the rebellion, which must depend upon the judgment of the General in command, and, therefore, in his view, the measures to be taken were the measures directed or approved by him.

Whether or not martial law had been properly declared, it was not, as he considered, for the military Commander to judge, nor the officers, whose duty it was, under his direction, to carry it out. They assumed its legality, and its operative effect (*a*), and they deemed themselves bound to carry it out; and as it implied a state of rebellion, and all the appearances they observed indicated it, their measures were directed in accordance with the declaration of martial law, not merely to meet resistance, but to suppress rebellion, and they deemed themselves bound to take all such measures, aggressive or deterrent, as should attain that object.

The officers considered themselves not only authorised, but compelled by their orders to carry out martial law, that is, military measures, until directed by the General to abate those measures, and did not consider it was for them a question of necessity (*b*), but of military authority. But, on the other hand, none of them deemed that their orders, through a legal justification, justified them in disregarding considerations of humanity; on the contrary, they sought

(*a*) This, in terms, declared that the military should have all powers of exercising the rights of belligerents, that is, of using all the means and measures of war against such of the inhabitants as they might consider opposed to the Government and its loyal subjects. This was in the hands of the Secretary of State when he wrote his despatches for enquiry, as it reached him with the first despatch of the Governor.

(*b*) If it were a question of necessity (as *it is* when the military are acting in aid of the civil power at common law, *vide ante*, p. 63), none of their measures could legally be justified, except in one or two cases of actual encounter (*vide ante*), for it can never be *necessary*, in the strictest sense, to attack men unless they are actually engaged in felonious outrage or insurrection, and it can never be *necessary* to execute a prisoner. But the *necessity* for martial law was for the Governor.

by their evidence, to show that they had to the utmost regarded these considerations. And whether they had done so, it is conceived, formed the scope of the enquiry.

The scope of this work being legality, and all questions of legality being fully raised by the statements of the officers themselves (*a*), there is no necessity to enter into matters of disputed fact (*b*), nor, on the other hand, to enter into circumstances (*c*), which would go rather to the propriety than the legality of the measures taken, or the acts committed.

The main importance of the enquiry lay in its bearing on the general questions raised by the Secretary of State, as to the general mode of carrying out martial law. And of the general questions thus raised by the Secretary of State, the fundamental question was as to the rules or principles upon which it was determined who should be deemed to be in hostility, and liable to the severity of military measures.

As to this important question, some points were settled satisfactorily and without difficulty. In the first place, it did not appear that the military authorities considered that the *primâ facie* (*d*) presumption arising against a man from

(*a*) Who avowed the attacks on parties of men supposed to be rebels, the execution of prisoners, whether on summary enquiry or by sentences of courts-martial, the inflicting of floggings and the burning of houses, so far as these acts were committed under their orders or directions; as to such as were *not* so committed with their orders or directions, they were not within the scope of martial law, and so not within the scope of this work.

(*b*) Which occupied nine-tenths of the time of the Commissioners, with little practical result, as for reasons already referred to, all that was really *reliable* was contained in the statements of the officers or of disinterested persons.

(*c*) As to the mode of inflicting capital punishment in some circumstances, and which, no doubt, if designedly altered for the purpose of torture, would be illegal; but all these matters were denied as regarded the officers.

(*d*) It was true that the General in command avowed before the Commissioners that *prima facie* he regarded every man in the district (*i.e.*, not with the authorities), as a rebel, and the reasons have already been given for conceiving him to have been right in that presumption. But, on the

his being in the declared district, and *not* with the Crown, justified any military measures against him beyond mere arrest upon suspicion.

In the next place, it appeared that, so far as regarded the orders of the officers, or the measures they approved of or directed, they did not consider even the possession of plunder (*a*) sufficient to warrant capital execution or attack, unless from its nature, or other circumstances, it raised a strong presumption, amounting, if not rebutted, to sufficient proof of actual and active complicity in the rebellion, and the acts of outrage which accompanied it.

And further, it appeared that men being in bodies together, within the district in rebellion, though it was deemed *primâ facie* an evidence of hostility (*b*), would not

other hand, it was manifest from his acts and those of the officers, that this, *per se*, was only looked upon as a basis on which, from other circumstances, such active participation in the rebellion might be presumed, as would justify measures of military severity. And it was obvious, that the *prima facie* presumption was always, practically, either aided or rebutted by the circumstances under which men were met with, in bodies, in the bush, with arms, or with those who had arms, in the immediate neighbourhood of scenes of devastation or of outrage, at which it was manifest they must have connived and probably that they had assisted, and so forth. And thus, in such passages as that in Capt. Hole's report (*vide ante*, p. 235), within a mile of, as every rebel who could not give an account of himself was shot, were explained by the context, and by the evidence upon this principle, *i.e.* that the officer found himself in a place which had been the scene of such widespread devastation, so as to raise a strong presumption against any negro in the immediate neighbourhood, who could give no account of himself to rebut that presumption.

(*a*) This was remarkably illustrated, even in those reports which had created most sensation, as, for instance, the report of the officers in command of the volunteer force (*vide ante*, p. 242). For, it there appeared, that for the mere possession of plunder, men were only flogged. See also the evidence of Capt. Ford, Lieut. Adcock, and others, in which it appeared that the distinction was always drawn between mere possession of plunder, and proof of active participation in the rebellion. The Secretary of State had drawn attention particularly to this, *vide ante*, p. 244.

(*b*) As certainly it might fairly enough be considered, especially when it is borne in mind that such bodies of men were always met with in a district which had been the scene of widespread devastation by bodies of men, of the same colour, race, and class, within the few days previous, or on the

warrant military attack or execution, if the men in such bodies were either willing to submit or surrender, or were near enough, to see if they were armed or whether they would surrender; or could be got at, to capture them if they would not; but, that such bodies were only fired at, or attacked under such circumstances and conditions as appeared to preclude any other course.

That is to say, in cases of bodies, where men were met with under such circumstances, in a district the scene of widespread devastation, who might, or might not, be armed, but who were presumably engaged in a warfare carried on by means of devastation committed without arms; bodies of men who would not submit or surrender (*a*), nor come near enough to be compelled to, or to be captured, and who must either be fired upon at a distance, or be allowed to escape all military measures whatever.

This would depend, it is obvious, greatly upon the nature of the warfare carried on (*b*) by the insurgents, and the number engaged in it (*c*); and thus it was that this part of the enquiry, as to the measures taken in the suppression, was so closely connected with the former head of enquiry,

preceding day, or perhaps on the same day. And it would be very immaterial whether they were or were not actually armed; their numbers made them more formidable than smaller numbers armed (*vide ante*, p. 12–16), and if they were going about partly to obtain arms, and if they carried on their irregular warfare by means of arson and plunder, and by the terror of their number, they would certainly be in hostility.

(*a*) It did not appear that any who *submitted* or *surrendered* were, with the sanction of the officers, subject to execution or punishment, unless upon enquiry found guilty of crime; and even this rarely occurred, because it is obvious that those who were conscious of guilt would *not* surrender, and the great difficulty lay in their pursuit and capture.

(*b*) Considering the numbers of negroes who engaged, during several ensuing days, in actual rising, and acts of armed rebellion, at distances of ten, twenty, thirty, or forty miles from the seat of the original outbreak, there was ample ground to believe that some thousands of them must have been actively engaged in the rebellion, and acts of outrage, which accompanied it; and these, of course, would represent a much larger number participating in it secretly.

(*c*) There were from 600 to 800 at the original outbreak at Morant Bay,

as to the nature and circumstances of the disturbances. For the nature of the measures taken, must depend on the nature of the warfare to be encountered. And there was a great deal of evidence on this head, as to the numbers engaged, and the course of hostility they pursued, which, it appeared, was irregular, and ambulatory, and predatory, large bands of men, committing depredations, and then on the approach of the military, sheltering themselves in the woods, where they could not easily be followed, and could hardly be captured.

To receive the answers and explanations of the officers, upon their enquiries, was the main and primary object of the Commission under this head of the enquiry, "the measures taken for the suppression of the rebellion, and the conduct of those engaged in it." And the nature of their answers and explanations was necessarily closely connected with the first head of enquiry, as to the nature of the disturbances. For they rested mainly on the nature of the warfare in which they engaged, and of the rebellion they had to suppress (*a*), and the necessity of their measures, not

and bodies of 300, 400, 500, or 600, were engaged in subsequent risings at Bath, Moncklands, Manchioneal, Port Antonio, &c., or places at 10, 20, 30, 40 miles from Morant Bay. The aggregate number who thus, at great distances within a few days, took part in acts of outrage and of armed rebellion, could not be less than between three and four thousand, and perhaps it would be more near the truth to say between four and five thousand. This would represent, in all probability, only those that were actually engaged in the rebellion, not all those who were in complicity.

(*a*) It would be manifest that, if the rebellion had been one which was carried on, as in regular warfare, by means of armed encounter in the field, then the military measures to be taken for its suppression would naturally have the same character, and would be pointed rather to the use of arms, and against actual resistance. But if, as appeared on the evidence, the rebellion was rather of an ambulatory and predatory character, carried on by large bodies of men who, whether with or without arms, by means of arson or plunder, spread devastation wherever they went, and sought to *avoid* the military by taking refuge in the bush, so that they could with difficulty be followed, and often could only be got at by firing on them at a distance, it would be obvious that the measures to be taken must be entirely different.

indeed to meet resistance, but for the suppression of the rebellion.

With regard to the measures actually directed by the orders issued, or directions in any way given, by the General in command, to the military officers, it appeared, as already shown, that these were quite general; and that, for the most part, there were no particular orders issued to the officers in command of detachments, who were sent out to attack, rout, and capture the rebels, and were left a great deal to their own discretion (*a*).

The first question that would arise as to the measures to be taken would be, who should be deemed rebels, or who should be attacked or arrested as such. The first orders, as to the movements of the troops (*b*), were based upon the

(*a*) Thus the Commander-in-Chief said he had given no particular order to the officer; it would have been absurd to give him instructions. When asked, if he gave him instructions about dealing with the prisoners whom his success enabled him to capture, Major-General O'Connor said he had not given any other instructions on the subject, than those contained in his despatch of October 20 (*vide ante*, p. 151), the effect being that he was to hold a summary investigation on the spot, and execute or punish those whose guilt was clear, and release those who appeared to be innocent. That rebels were all around him; and it would have been impossible to give instructions from Kingston as to how Colonel Hobbs was to act in Mahogany Vale, under such circumstances. His duty, of course, was to attack the rebels. The General in command, in like manner, merely sent out detachments to different directions to surprise or attack the rebels, leaving their course of action very much to their discretion. (*Vide ante*, p. 143–149). So Colonel Hobbs stated, "When I started on the expedition, I had no instruction as to the manner I was to treat the population—executed and flogged rebels for being found in arms, and for plundering, on the clearest evidence; the proclamation of martial law authorised me to punish rebels—did not punish anyone on the mere evidence of plundering, but being found in arms and taking part with, or going to attack persons with a view of taking life, as in the instance of 13 men, stated to have been executed for a felonious attack on the house of one Patterson, with the view of killing him, if they could find him.

(*b*) Which were simply to go in every direction where outrages had been committed, and where, therefore, it was supposed, or in the immediate neighbourhood, rebels would be found. Thus, in the sense primarily used, the word "rebel" meant men *actually* in insurrection, actually committing felonious outrages, actually going about in bodies to commit

supposition that bodies of men were about, as for several days they were, in actual insurrection, and engaged in actual perpetration of felonious outrages; if they could be met with and attacked in the act, of course the case was clear, and indeed would not strictly require martial law at all.

The General in command avowed, before the Royal Commissioners, that he considered the whole of the able-bodied population of the declared district to be *primâ facie* rebels, because the entire district was declared to be in a state of rebellion (*a*); for this, he considered, was the basis of martial law. He considered himself, he stated, as in an enemy's country, and regarded every man he met, not aiding the Crown, as *prima facie* an enemy and a rebel, that is, unless circumstances showed the contrary.

But, in point of fact, the question never did, and hardly ever could, arise in an abstract form, for men were met with always (*b*) under circumstances which aided or rebutted this

them. As soon, however, as the military began to be active, these actual outrages ceased; but, as they ceased, it was obvious, only from temporary panic, and on account of the actual presence of the troops, the men who had first been engaged in actual insurrection, and had been committing felonious outrages, and who would recommence their career of plunder and massacre as soon as the troops were exhausted or withdrawn, were not the less rebels, and not the less in hostility.

(*a*) If not, he said, he presumed that martial law would not have been declared, and no doubt that is so in theory. The great body of the population, the whole population, as a body, are deemed to be in rebellion. The extent to which this theory is realized in actual fact, depends necessarily upon the nature and circumstances of the rebellion, and the probable number, or apparent proportion of the population engaged in actual insurrection, or in secret complicity or sympathy with it. In this case, it must be borne in mind that it was the rebellion of a race, comprising the great mass of the population, and of course the General meant his proposition only to be understood as applying to men of that class. Moreover, the number of negroes engaged in outrages, at many different and distant places, was so great that there must have been thousands actually engaged in the insurrection, so that the probability was that men seen about were guilty.

(*b*) For instance, they were almost always met with in bodies, which of itself, in time of rebellion, raises a presumption of hostility; then they would be met with in the bush, or in the neighbourhood of places sacked and devastated, and also in the neighbourhood of huts deserted, and having

primâ facie presumption, and tended to satisfy the military as to whether or not they were to be considered "in hostility," within the declaration of martial law. And evidence was entered into as to the circumstances and conditions under which men were met and dealt with.

It appeared that, so far as they possibly could, and wherever they could, the military endeavoured to attack the rebels in the very act of felonious outrage, or of armed insurrection; but as it was from the first the object of the rebels to avoid such encounters, the military, with all their promptitude, could only, in two or three instances (*a*), succeed in thus attacking them in the act; and, with the exception of such deaths as were caused in those actual encounters, all the acts committed by the military, beyond actual resistance, and the mere arrests of prisoners, were, at common law, illegal and unjustifiable.

Unless, therefore, the declaration of martial law authorized them to do more than this, it authorized them to do nothing (*b*), and was, in fact, a futile formality, an empty and unmeaning form. If, on the other hand, it was any-

in them plunder or arms, &c., the inhabitants of which were out somewhere, and had evidently withdrawn to avoid the military. Then the men would stand aloof from the military, instead of coming forward to surrender, or seek their protection.

(*a*) In one instance only did the troops catch rebels in the very act of outrage, as at the house of Mr. Duffus. (*Vide* Lake's report, *ante*, p. 144). And in only two instances did it appear that the rebels had actually met the military in armed encounter. (Instances stated by Colonel Fyfe and Colonel Hobbs.) In all other cases the military came, indeed, hot upon the traces of the rebels, but found that the rebels had fled before them, and taken shelter in their natural fastnesses, the forest, or the bush, or the mountain. And this, in fact, was the great difficulty the military had to encounter. (*Vide ante*, p. 136, 165, 167.)

(*b*) For anything that could be done by the military at *common law*, of course, would not require a proclamation of martial law, and it would be idle to announce, by a formal proclamation, that which would be legal without it, and worse than idle to announce what would be illegal, even under it. But the military authorities well understood the difference between their action in aid of the civil power, and under it, and their independent action under martial law. (*Vide ante*, p. 130).

thing more than a mere unmeaning form, and had any real legal force and effect, it authorized the military to do all that it purported to authorize,, viz., to use military measures against all whom *they considered* to be in *hostility*.

The officers, notwithstanding certain passages in their reports (*a*), which had appeared to imply or suggest such a course, did not in their evidence avow, or attempt to vindicate any measures of indiscriminate attack upon the population in the declared district, but, on the contrary, disavowed it, and attempted to show, that in every case in which they had allowed or ordered attack, it was under such circumstances as might suggest to military men the necessity or expediency of such a measure (*b*).

It is important to bear in mind that, under this head of enquiry, as to the "measures taken," and "the conduct of those engaged," the enquiry would necessarily turn, not so much upon matters of fact, as they actually *were*, as upon the circumstances and appearances, as they presented themselves at the *time* (*c*) to the officers thus engaged. This must necessarily be so of military measures; and,

(*a*) The principal passages which were supposed to suggest this were, that in Captain Hole's despatch, "every black within a mile, who did not give an account of himself, was shot (*vide ante*, p. 234); and that in Captain Ford's private letter, "if they fly they are shot," &c. (*Vide ante*, p. 242.) But as to the former, the officer endeavoured to show that, under the circumstances, the presumption was that any black within a mile (*i.e.*, within a mile of a place which had been devastated), had been engaged in the rebellion; and as to the other case, it only referred to the course taken by a particular detachment, and a detachment of *volunteers* and *civilians*, or of black soldiers; and it was remarkable, as already observed, that most of the alleged excesses, at all events, so far as established in evidence, were committed either by volunteers or by blacks.

(*b*) It is not material, for the purpose of this work, whether they sufficiently established this, in point of fact.

(*c*) Thus, whether bodies of men in the bush, or at some distance, were more or less numerous, or likely to be armed, or whether they were lurking there; and whether, if allowed to remain there, they would be dangerous; and whether they could be got at and captured; or whether any measures could be taken to dislodge them, except to fire at them, would all be questions essentially military, and dependent upon personal observation.

moreover, many of these circumstances and appearances would be matter of personal observation, and such as could scarcely be conveyed by oral description to others (*a*), especially to laymen, least of all, perhaps, to lawyers. And, further, the propriety of the measures taken upon such appearances could not be judged of after the event, by the actual facts, as they afterwards appeared.

The nature of the measures to be taken for the suppression of a rebellion must, it is manifest, necessarily depend on the nature of the rebellion, and hence the close connection between this head of enquiry and the former, as to the "nature and circumstances of the disturbances." If a rebellion were conducted mainly by means like those of regular warfare, as by encounter of armed bodies in the field—measures similar to those of regular warfare might be sufficient. But if the rebellion were of a wild marauding character, conducted by hordes of men, armed or unarmed, —whose power was rather that of numbers than arms (*b*), and who *avoided* encounter in the field—then measures must obviously be wholly different.

It was manifest (*c*) from the evidence that the detach-

(*a*) The features of the country, for example, or the cover afforded, or the numbers of men lurking in the bush. There were many passages in the reports, referring to such features of the country. The defile at Stoney Gut, for instance, three miles long (see despatch of Colonel Hobbs), or the bush (see report of Lieutenant Adcock).

(*b*) It had long ago been pointed out by our old lawyers—in expounding that branch of the law of treason which relates to the levying of war against the Crown in cases of rebellion—that there might be as much of danger and of terror caused by numbers as by arms. It is manifest that 100,000 men, armed with scythes or reaping hooks, may be as formidable to 1000 men, as the smaller number could be, armed with deadly weapons. And the numbers would speedily arm themselves by seizure of the arms of those they overwhelmed. And if a party of 100 men visited a house or an estate in search of arms and to murder the inmates, it would matter mighty little whether they had arms or not.

(*c*) Evidence of Mr. Warrington, magistrate of St. Thomas in the East, and manager of a cotton company at Manchioneal. "On the 15th we went to Port Antonio. We saw a lot of refugees aboard the barque Reunion; we passed along the coast of Manchioneal, and *saw every place destroyed*,

ments, marched and acted, amidst all the traces of a ruthless rebellion, seeing on all sides of them houses of the white proprietors sacked, and gutted, and destroyed; and the huts or houses of the negroes filled with plunder, evidently taken therefrom, which of course was strong presumptive proof that the negro inhabitants had been concerned in these outrages.

So it appeared that, as had been from the first expected would be the case (*a*), the bands of men engaged in this

On the 15th accompanied the 6th Regiment as guide across the country. We marched as far as the "Castle," 12 miles along the coast to Mulatto River. Saw in front of several places traces of lawlessness; saw some of my own property destroyed and scattered about. The distance was about 40 miles round the road to Morant Bay. We went on to "Coy Hall," about a mile from Morant Bay; found negro huts filled up with plunder; there were a number of occupants; they said, before we went in, that they had nothing to do with what had taken place, and that they had nothing in their huts. We went in and found to the contrary. They were ordered to come out; pulled out some of the stolen property, and fired the huts. Nothing was done to the occupants. On Sunday we saw Mulatto River House, it was burnt; passed "Kensington," the house of Mr. Foote, and found it gutted. On Monday we marched to "Muirton;" saw places gutted, and one house burned. Three or four stores were gutted. The Court-house was smashed to pieces; found nothing touched at Muirton Estate. We stopped there. A small party was detached, and went to Williamsfield. And so on everywhere. So Lieutenant Adcock, describing the same, stated that he found the houses on the estates sacked and gutted, and plunder in the huts in the district. Gold watches and sticks stained with blood, &c., told the tales; found Moncklands very much wrecked by the rebels, &c. Manchioneal had been regularly sacked as by an invading army.

(*a*) (*Vide ante*, p. 164). Thus Captain Hole:—"When I reached Manchioneal, I heard reports that the rebels had only withdrawn for reinforcements, found every house deserted," &c. So Lieutenant Adcock, "As I passed through the villages, about 300 rebels rushed through the bush, armed with cutlasses. Saw about 50 at Beckford, rushing from all directions into the bush. I was told that the villages, I was passing through were full of rebels, and that these places were their strongholds." Similar passages abound in the evidence of the officers. So when Colonel Hobbs wrote that thousands of rebels were around him, he wrote what was really the natural inference from, and the general result of, the appearances he observed, and the facts which were undoubted. As thousands had been

irregular and barbarous sort of warfare, had, on the approach of the troops, betaken themselves to the woods; the officers represented that they were led to infer from these circumstances, and from the reports they received, and from the appearances they observed, that large numbers of rebels,—that is, of those who had been engaged in these acts of rapine,—were lurking in the bushes around them.

The officers, finding numbers of men, under these circumstances, in the bush, in a position which would afford them such advantage for shelter and for attack, and finding that, in some instances, they were armed, and believing from what they observed and heard, that they were lurking there to renew the insurrection after the military should be withdrawn, considered that they were in hostility; and as it was impossible to get at them to capture them, permitted the troops to fire at them (*a*), as the only practicable way of dealing with them.

Evidence was given (*b*), in confirmation of the reports of

engaged in these outrages over a space of 40 miles, they must be somewhere; and would probably be those in the bush, not far off.

(*a*) Thus Captain Hole, in his evidence stated, that he saw men in the bush, that he heard they were gone for reinforcements, &c. He said his attention was drawn to men loitering in the bush, and he saw two or three soldiers run into the bush, and heard three or four shots fired; he saw three bodies lying on the road, and made enquiries about them; prisoners were brought before him at Long Bay, one was found in the bush with a flask of gunpowder upon him, he was tried in the same manner as the others; went on to Cog Hall, where he expected resistance, but found no one there; there was bush on either side of the way, and he made preparations for a regular attack, as he expected one; sent out a skirmishing party, and heard several shots. So Lieutenant Adcock stated that as he passed through the villages he heard and saw bands of rebels rushing into the bush, or through the bush. (*Vide ante*, p. 330). In two or three instances, it happened that, under these circumstances, innocent persons were killed by accident. Thus, in the above case, Captain Hole states, two, he was informed, were rebels, and the other was an innocent man; the two were running away from the advance guard, and the third man came out of his house and ran across to stop them, and the three were shot. So Colonel Fyfe's detachment accidentally shot a woman in the bush. Such accidents always happen when the military act in this country.

(*b*) And Colonel Hobbs reported on October 16, from Moncklands:—"I

officers at the time, that they had reason to believe, from the reports they received, and from the symptoms they observed, that the cessation of resistance was by no means the cessation of hostility or rebellion; but that the rebels were merely running from place to place, and lurking in the woods and mountains, to avoid an encounter with the military, and in the hope of renewing the insurrection when they should be exhausted or withdrawn.

According to the evidence of the officers engaged in the suppression of the rebellion, when the acts of armed insurrection ceased, the rebellion threatened to assume the most dangerous phase (*a*) which a rebellion can possibly assume; that in which the rebellious population betake themselves to their natural fastnesses, and lurk in the forest or the bush, avoiding encounters with the troops, until, when they should be exhausted or withdrawn, they may renew the insurrection in safety.

hope to make a forced march to Stoney Gut, in this parish, where the rebels, driven westward by General Nelson, have assembled in great force, and where they have a large supply of gunpowder, arms," &c. He gave evidence accordingly, that at Stoney Gut he found a chapel which had evidently been just evacuated by a large body of men, traces of arms, &c. Reported on the 22nd October:—"I consider this part of the country free from rebels; and from the information I have received, I think it probable that all, except isolated cases, have gone to the interior towards Blue Mountain Valley; if the rebels were in an organised state, they could, with ease, have destroyed every man of my party; the bush and cane fields affording such cover as to defy pursuit, and to render precautions against an ambuscade useless with the force at my disposal, without being armed with hand grenades."

(*a*) It was this which the Governor, at the first outbreak of the rebellion, dreaded and apprehended (*vide ante*, p. 164). And it is notorious that it is this phase of rebellion which has always proved most dangerous and difficult to vanquish. It has baffled us in New Zealand and Caffraria, and inflicted upon our forces the most severe and mortifying repulses. If only the negroes had not been deterred by the terror of our forces, the island afforded such facilities for this sort of warfare, that they might have held out long enough to cause great disasters, and it would not be known for some time that they were cowed, as well as concealed and sheltered. Numerous passages in the reports showed that the officers, for some time, continued to expect attacks from men in such positions.

Instances (*a*) were stated in which, ten days after the rebellion had broke out, armed parties of rebels actually met and ventured to attack the troops; and although it appeared that the rebels never made anything like a successful stand against the troops, yet, as they, on several occasions, so long after martial law had been declared, attempted it, the officers inferred that they had every disposition to do so, and that if they relinquished these attempts, it was only from the fear of the troops, and the hope of renewing the insurrection when they should be withdrawn.

As, in their reports to the General in command, the officers had stated, without disapproval, and with express approval, that they had fired, not only upon parties of men seen to bear arms, but on those who were seen in bodies at a distance, so that they were apparently in hostility; so the officers in their evidence (*b*) avowed similar acts,

(*a*) Thus, Colonel Hobbs stated in his evidence:—"On one occasion, at Coley, they rushed toward us with arms and cutlasses; there were about 70 of them about 50 yards' distance, but they turned and fled." On another occasion he found traces of an armed body of men, and was told that they had fled; and soon after saw a large body of them on the other side of a "gulley" approaching the troops, armed, and apparently intending an attack, but they were fired on, and withdrew into the bush. So, evidence of Colonel Fyfe:—"On the 20th he received a challenge from the rebels that they were ready to meet the Maroons at Torrington, where they said they had a fort from which they could 'kill a hundred men coming one at a time.' Torrington, it should be stated, is a settlement from which, according to the evidence, 100 armed men marched down to Stoney Gut just before the outbreak, and united their forces to those of Bogle. On the morning of the 21st, Colonel Fyfe took 70 of his Maroons against this village, and sent them up the mountain side in three parties. The assailants rushed up the hill side, towards the village, in three parties. The negroes, armed with cutlasses and guns, were seen clustered on the hill above. They then fired 10 or 12 shots upon the most advanced party, wounding one of the Maroons. Several shots were fired at them as they went, and this fire was returned with effect. The rebels were all scattered, and he saw no one. Torrington was deserted; the population had taken to the bush.

(*b*) Thus, Colonel Hobbs stated, that when he was at Monckiands, he was

explaining that, as the rebels as much as possible avoided actual encounter with the troops, and lurked in the shelter of the bush, or remained at a distance, this course was the only one practically available.

The officers were examined (*a*) with particularity and stringency, as to the circumstances under which their detachments had fired upon bodies of men under the supposition of their being in hostility, and described the appearances and circumstances under which they had acted, and which led them to that supposition. And they avowed that, when they found bodies of men believed to be

surprised by being told that a quantity of armed rebels were coming, rushed out, and saw about seventy armed rebels. He then gave the order to present. The moment we came out they fled ; some turned round, and fired a few shots at us ; they ran on, and kept jumping into the bush. They had muskets and machettes, and the soldiers fired. Followed them four miles on foot to another disaffected district, called Coley, where he burnt houses, pointed out to be those of noted rebels. I took back at least a dozen prisoners. After resting, returned to Moncklands; our force was 130 men, there were at least 1,000 men surrounding us; looked at them with my glass, the hills were covered with them. I can't say if all were armed. I could see them running backwards, and towards us.

(*a*) Thus, Colonel Hobbs described the circumstances under which his detachment had fired on bodies of men they had seen. He found, he said, all the outward signs of a country in open rebellion, all lawful authority was suspended, signals flying, negroes in arms, and houses smashed, gutted, and destroyed, and numerous indications of hostility, which it was impossible to mistake. Saw hastily made earthern works, heard horns blowing, and scouts informed him that they had gone on. Houses beyond Moncklands were deserted, furniture removed to the bush, heard shots, searched deserted houses; the magistrates pointed out the houses of the leading rebels; fired six houses; marched to Mount Lebanon, and found the place quite deserted; found a chapel there, and discovered foot marks in front of the door; found cutlasses, and a large Bible laying on the floor in the chapel, and it was quite evident that they had left about five minutes before, and he was told that the rebels were there, they had evidently fled on our coming. After we had burned the chapel, saw a large body of rebels down the other side of the gulley approaching the troops, who were separated from them by a gulley. They were coming up the hill, heard the prisoners say, there they go, and I said who? they replied, the rebels. I looked through my glass, and saw them armed; we fired on them; was informed by the prisoners that they were rebels.

armed, and amidst all the outward signs and appearances of rebellion and hostility, the troops were ordered to fire upon them.

The general case, on the part of the officers, came in substance to this, that, after the first few days of martial law, the insurgents, not willing to meet the troops in open encounter, withdrew in large numbers, upon their approach, to the woods, where they lurked in security, their huts betraying, on the one hand, stores of ammunition, and other preparations for hostility; and, on the other hand, traces of plunder, and often of murder, showing their active participation in the rebellion, and their disposition to renew it(*a*).

That it was necessary, therefore, to follow them, to clear the woods of them, to drive them out, and, if possible, to capture them; but if they could not be got at, then to fire at them, to compel them to surrender; and, in doing so, to kill a great many of them. And, further, that in order to deprive them of the shelter of the habitations which they used as depositories of ammunition, and as places of resort, to burn a great many of their huts or cottages. Such was the general nature of their evidence as to their operations in the field, as regarded firing upon bodies of men, who, whether armed or not, would not surrender, and were in apparent hostility (*b*).

(*a*) The evidence of the officers commanding detachments abounds in statements of this nature, that they found the houses deserted, and filled with plunder, and the bush all around filled with negroes, who were seen and heard from time to time in bands of hundreds, this bush being so dense that it cannot easily be seen through at a short distance, and is difficult of access or of passage, especially for strangers. Thus, at Mount Lebanon, Colonel Hobbs, the senior officer, stated that he found houses deserted, but found in a meeting-house cutlasses, and traces of a number of men having been recently there, and afterwards saw a large body of negroes, apparently armed, and upon whom his force fired. The inference he drew was that they were rebels. So in another settlement he found plunder and ammunition in the houses, which were deserted, and met a body of armed negroes, who retreated into the bush.

(*b*) Evidence of Colonel Hobbs:—Found the houses deserted, and he

It appeared, therefore, that the military detachments, when they came upon bodies of men of the same class and race as those of the insurgents—lurking in the bush—in the neighbourhood of places that had been sacked or devastated—considered them presumably as in hostility; and, if they were not near enough to capture them, they fired at them (*a*), or if they *were* near enough to capture them, they *captured* them and tried them, summarily, and executed those whom they were satisfied had been active in the rebellion. Nor did it appear that this course had been at all censured by the military authorities as contrary to the usages of the service in such cases; nor did the Commissioners obtain any military evidence that it was so.

In the view of the military authorities, rebels were not the less rebels because they fled before them, or because

pointed out the houses of every one who had joined the rebels, and said "that they had gone to Morant Bay." There was everything to indicate that they were in a state of open rebellion,—we observed scouts watching us on the hill tops, and everything induced us to think that such petty military movements were from a people who were in rebellion; we found lumps of lead, and bars of iron, a great number of powder horns, new cutlasses, not used before; there were fire-arms in the houses, and several bludgeons, some covered with blood *too*; found also a drum. They were evidently manufacturing those things; we found the lead had been newly cut. Somerset is about three or four miles long; thirty or forty houses were destroyed; I ordered that, wherever women were, they were not to be touched or molested; the presence of any in a house (he stated elsewhere) saved it. Saw tea meeting tickets were printed, "Native Baptist Chapel, Mount Pisgah, admission 1s.," and on the back of some were written, "to discuss politics." So elsewhere he stated that, on the 23rd October (ten days after martial law was declared), he marched again through Somerset and Garband Hall; we found Garband Hall to be in open rebellion; we took no prisoners there, the place was deserted, searched for rebels, but found none, ascertained that they had all fled into the bush. Magistrates went with me, houses were pointed out by the magistrates and others, and we destroyed them, we destroyed about thirty; all the inhabitants were gone; *there was a great deal of powder and fire-arms in the houses;* we heard very great explosions while the houses were burning; we returned to Moncklands, and prisoners were still coming in.

(*a*) It was not suggested, in the examination of the officers, either by the president, a military officer of high rank—or by any one else—what course the military could take in such cases, if they were not to take this course.

they took refuge in the woods; nor were they any the less to be considered in hostility, merely because they left off these acts of outrage when frightened at the approach of the troops (*a*). On the contrary, in the view of the military, the very opposite presumption was to be drawn: that those who had sacked a place to-day, would sack another place to-morrow, if they could, and that those who fled into the woods when the military approached, would probably come out again when the military withdrew.

And that, therefore, if they would not surrender and could not be captured, they might be fired at (*b*), to dislodge them and drive them out of their cover, and compel them to surrender; in short, it abundantly appeared that, in the view of the military authorities, although they were authorised to use the measures of war, it was against those who were not entitled to the rights of war, but liable, on the one hand, to the retaliatory acts of warfare, or to be treated summarily *as criminals*, if taken.

So far as to the acts, or orders of the officers themselves, or the acts done under their orders and direction, or with their sanction. The Secretary of State, however, had (*c*)

(*a*) In short, they did not consider that the avoidance of encounter was any evidence of cessation of hostility; or that the cessation of insurrection was the suppression of the rebellion. They deemed their work to be the suppression of the rebellion, and deemed it *not* suppressed, so long as large bodies of rebels were lurking in places of shelter (*vide* p. 292).

(*b*) This was the principle on which such acts as firing on bodies of men without waiting to be attacked by them, or the burning of houses in which plunder was found, or rebels resided, was vindicated. War in its nature is retributive and retaliatory, and its only limitations are military usages and considerations of humanity. If the enemy burn houses, the enemy's houses may be burnt, and this was laid down by the General and the officers, in the very orders they gave, *restraining* the measure by considerations of humanity. So, if men went about, with or without arms, burning houses, they might, it was deemed, be attacked, if they could not be captured, whether or not found with arms in their hands. But here again, considerations of humanity would come in to restrain the exercise of this measure of war. And these considerations, it is considered, rather than those of strict legality, formed the scope of the enquiry of the Royal Commission.

(*c*) *Vide ante* p. 244.

on observing some passages in the reports (*a*), whence it appeared that the officers were not always present with their men, or the men had got separated from their officers; and aware that this might open a door to excesses beyond the orders of the officers, pointed some of his enquiries to the important question, how far the officers had kept a control over the men.

As martial law is military rule, and military rule means military orders and authority, it was considered that the measures taken and acts done under martial law, should properly be under such military orders and authority (*b*). Hence, as the Secretary of State had specifically directed attention to this point (*c*), the attention of the Commissioners was also directed to it (*d*), and one main point of their enquiry was, how far the acts done by the military or volunteers *were* under military orders and authority.

The governing question, so far as the conduct of the

(*a*) Thus, Captain Hole, in his report of the 19th of October, stated that "Three men of the 1st West India Regiment got separated from this party, and proceeded as far as the Plantain Garden River District, and from their reports I learn a great number of rebels are lurking in that district. They informed me on their return that they had shot about ten rebels; three of whom were concerned in the murder of Mr. Hire." As to this, it appeared in the same despatch (*vide ante* p. 156), that they gave pretty conclusive proof, as they brought back a great deal of the plunder taken from their houses. But it appeared that ten men had been shot as rebels, without the presence of an officer, and the Secretary of State had directed particular attention to this, and evidence was taken upon it. It appeared from the evidence of the officers, that they were perfectly aware that it was their duty, as far as possible, to prevent their men from firing without orders, &c.

(*b*) *Vide ante.* This is of the essence of the whole question, and therefore has been fully entered into in Parts I. and II.

(*c*) *Vide ante,* p. 252.

(*d*) Hence, also, the necessity for an act of indemnity to cover acts *not* done under military orders and authority, *though* done honestly for the suppression of the rebellion (*vide ante*, p. 229—233). Hence, also, the officers in their evidence were anxious to show that they had given distinct orders to their men not to fire without orders, and had insisted on all the civilians and volunteers and irregulars being strictly under military order (*vide* Ev. of Lieut. Adcock).

officers were concerned (*a*), was, whether they had done their best to keep their troops under control, and to restrain them within the bounds of discipline and obedience to orders, and the usages of the service; and evidence was given that they had, for the most part, done their best to attain this object.

The officers (*b*) appeared to have upheld, as far as possible, that (except in self-defence), soldiers were not to fire without orders, and they enforced this rule of military discipline, even upon the volunteers who accompanied them, and they strictly maintained that martial law must be carried out under military orders. And it did not appear that the officers had ever authorized the summary execution of men who surrendered (*c*), or were captured, unless taken "red-handed," or after some sort of enquiry, and on some testimony of guilt.

It is true that, as there were isolated acts by soldiers, or more often by civilians, volunteers, or constables, in the *absence* of the military officers, in shooting rebels (*d*),

(*a*) This was the spirit and the result of the orders issued by the Brigadier commanding in the field, and the President and military member of the Royal Commission, Sir Henry Storks, put the question to one of the officers in this form: "During the time your detachment was out, was it kept in good order, according to the regulations of the service?" (Ev. of Lieut. Adcock) which appears fully to accord with what is laid down in "Simmons on Court Martial," that, in the execution of martial law, the officers are to be guided by the direct orders they receive, and the usages of the service.

(*b*) Thus, Lieut. Adcock received orders to go in command of a flying column, consisting of troopers, volunteers, and a body of armed planters, his orders being to go in search of rebels, supposed to be in force in the Plantain Garden River District, and that the planters were to obey his orders, and he told Captain Ford, who commanded the planters, on no account to allow any of his men to fire without express order.

(*c*) It is to be borne in mind all through, as already has been more than once pointed out, that rebels taken in the field are not entitled to the privilege of prisoners taken in regular war—that is, to be treated as prisoners of war—but are liable, by martial law, to be summarily dealt with, and either if taken in arms, or if on summary enquiry, found *guilty* of having been in arms, they are *liable* to instant execution.

(*d*) Thus, Capt Hole stated, "I ascertained by accident that prisoners

causing prisoners to be shot or houses to be burnt, measures, however, which the military officers reprobated and complained of at the time. In some cases, it was without their knowledge (*a*).

The Commander of the irregular force, whose conduct had been most severely complained of, gave evidence (*b*), as to the nature of the orders he gave them, and which he had reason to believe, on the whole, they had obeyed, to the effect that they were to attack or assail only those who had been actively engaged in the rebellion, and never to injure non-combatants.

were killed, while being brought to Gordon Grove, by special constables, who gave orders to the soldiers; it was not reported to me; I found it out by accident; I instituted enquiries; could get no one to tell me who the soldier was; I had had so much to do in looking after the rebels, that I did not appoint a court of enquiry." So the evidence of Samuel West, "I went with the soldiers as a volunteer; saw the villages burnt at Muirton by the soldiers; saw George Wood shot by a soldier; the soldier asked if he was a rebel, and some one said that he was."

(*a*) Thus, Capt. Ford, who commanded a party of volunteers, and a letter from whom (*vide ante*), had been considered as one of the grounds of enquiry, stated "that he opposed shooting men on the roads and of bringing in stragglers; disapproved of the acts, as were related to him, committed by the black soldiers on the road" (*vide ante*). Even in such cases, however, it appeared, that it was almost always upon *some information*, that the men shot were rebels.

(*b*) Evidence of Col. Fyfe. "His orders," he said, "were that all houses should be burnt in which stolen property was found, or which were pointed out by the guides as belonging to rebels, but that, in every case, one erection should be left in every yard, as a shelter for the women and children, and if there was only one hut in the yard, it was not to be touched. He had reason to believe that these orders were rigidly carried out by his own people. Of course he could not investigate each case, but he believed that the men obeyed his orders. And several of them were called to show that they had done so, and that not above twenty-five negroes had been killed, of whom nine or ten were killed in the field, and several by sentence of court-martial, and one by himself, red-handed. He said "Majors are of superior intelligence to the others; the Maroons had no drilling; they were undisciplined as far as drilling was concerned; but they all knew how to obey orders. He sent out a party under a captain to scour the country; they gave him no written report; three of the five were shot, without military authority; one by court-martial of Maroon officers, and two by regular court. Three or four Maroon officers reported to me, that men were de-

The measures taken by the order or direction, or with the sanction of the General, embraced not merely measures of attack against those in arms, but the capture of prisoners; and the summary execution of such as might be found to have been active in the rebellion, and the infliction of floggings for minor offences (*a*), the burning of houses found to belong to rebels, and to have been used for storing plunder or arms. That is, they embraced measures *deterrent*, as well as measures aggressive or defensive.

It never occurred either to the military or civil authorities of the colony (*b*), that martial law, the last remedy for a great emergency, was deprived of the potent deterrent effect of speedy punishment; on the contrary, they regarded martial law, it is conceived rightly, as the extension to the whole population of that terrible power of summary punishment, which is the most distinctive feature of military law (*c*).

livered to them by constables, and that they ordered them to be shot; and they were shot. He disapproved of it, and gave orders that no man was to be shot by them under any circumstances." So the non-commissioned officers and men gave similar evidence: "We received directions from Colonel Fyfe, when we went on to Torrington, not to shoot any one except those that fired at us, but that we were to capture all we could, and bring them in. Colonel Fyfe told us distinctly not to burn any place, except they were pointed out to us by our guides, as belonging to rebels; and if there were two houses in one yard, to save one for the women and children; and if there was only one house in a yard, to pass it and not disturb it; we obeyed Colonel Fyfe's directions. (Ev. of M'Farlane, Briscoe, Ellis, &c.).

(*a*) All these, it will be observed, are measures purely military, and to be justified as a whole; and such as could none of them be justified by common law, or by the functions of the military in aid of the civil power. Nothing is known in such a case of summary *punishment* of any kind, and all that can be done is to *resist* rebels in the *act* of insurrection, or to arrest them. These measures could only be justified by martial law, as an application of *military* rule to non-military persons (*vide ante*).

(*b*) The Attorney-General of the island sat at the first court-martial; which tried prisoners for acts of outrage committed before the *declaration* of martial law, but on the occasion of this rebellion. And the General repeatedly directed courts-martial to sit in similar cases. And he issued the warrants under which the courts-martial were held.

(*c*) That is, either summary punishment on the spot, or by sentence of

The view of the military authorities was that, as even in regular war with honourable enemies, soldiers who offend against the law, or usages of war, may be summarily executed when taken prisoner, so, under martial law, rebels who are not honourable enemies, entitled to the rights of war, but criminals, who offend against the first of the laws of war, by raising war against their sovereign or her loyal subjects, were liable to summary execution (*a*).

It was abundantly obvious, from the reports and acts of the General himself, and his approval of reports of officers, that he considered the measures of war included the capture of bodies of men, whether armed or not (*b*), and the summary execution of prisoners he believed to have been taking an active part in the rebellion; as well in the burning of houses, or other acts of devastation, as in the use of weapons; both being acts of hostility, showing the perpetrators were in hostility to the loyal subjects.

And, as the reports of the officers in command of detachments, disclosing that these measures were taken, went to the General in command, and through him (*c*) to the Com-

court-martial; which would be a matter for military discretion. But either would involve the same principle; punishment would be inflicted on account of its deterrent effect (*vide ante*).

(*a*) As spies, or assassins, or marauders and plunderers, acting under no lawful military orders. This is the nearest possible analogy to the position of rebels, pursuing a course of burning and robbery in their own country

(*b*) Report of General Nelson, 14th October:—"The trial of prisoners is now going on, and the result, I apprehend, will be against the rebels, strong evidence being forthcoming." October 15th:—"The prisoners awaiting trial for the rebellion will be arraigned before a court." It did not appear that any of them were taken with *arms in their hands*. So Captain Hole, whose conduct he highly approved of, reported: - "I intend to have destroyed all the houses in which *proved rebels* have resided." And again, in another report, after mentioning the acts of three private soldiers who had brought in prisoners (*vide ante* p. 238): "I consider that these three men have done good service. A great number of prisoners have been brought in by the constables of this district, all of whom seem to vie with one another to make amends for their late delinquencies by capturing *all the people concerned in the rebellion*;" amongst others, two ringleaders, both of whom were engaged in plundering and burning, and were hung.

(*c*) *Vide ante*, p. 168.

mander-in-Chief in the colony, and through him to the Commander-in-Chief at home (*a*), and no disapproval appeared to have been expressed by any military authority; but, on the contrary, in some instances (in substance the same as all the others), *approval* was expressed by the General in command, it may be presumed that these measures, so far as they were thus disclosed, were such as might be in accordance with martial law, and, *primâ facie*, were so.

As war is in its nature retributive and retaliatory, and as measures of hostility of the most destructive kind might be, and were carried on by the rebels without arms (*b*), and as the declaration of martial law expressly authorized military measures against those not merely who were found in arms (still less those only who were found with arms in *their hands*), but against those considered to be *in hostility*, the measures directed or sanctioned by the General comprised the capture and summary execution of those found to have been active in the rebellion.

It will have been observed (*c*) that the Governor, in one

(*a*) *Vide ante*, p. 241. It appeared that the War Office had received the reports of the officers, for copies had evidently been supplied to the Secretary of State for the Colonies. But the Commander-in-Chief had expressed, so far as appeared, no censure or disapproval, though these were all essentially military matters. So as to the Secretary of State for War, even although his attention had been specifically called to the military affairs of the colony at the time.

(*b*) The very phrase used by the rebels was, "If buckra has gun, negro has fire stick," (*vide ante*, p. 112, *in notis*), and the last rebellion had proved how fatal a weapon the "fire stick" may be. In the present case, though it was not so used, because the policy of the rebels was a more sanguinary one, to slaughter the whites, and preserve their places, plunder was carried on to an immense extent, and houses were sacked and gutted, as by an invading army. This, of course, would not require arms, when the rebels had an overpowering force in numbers. It had long ago been pointed out, by our ancient lawyers, that popular risings may be as formidable, by means of numbers, though imperfectly armed, as smaller bodies may be by the aid of efficient arming.

(*c*) *Vide ante*, p. 240, *in notis*. This alluded to the passage in the despatch of Colonel Hobbs (*vide ante*, p. 234), one of those singled out by the Secretary of State for explanation. "The constables had captured a

of his despatches to the Secretary of State, stated, in referring to the execution of prisoners, that "this implied, that it was after trial by court-martial, and either upon their being taken in arms, or upon direct testimony of their complicity in the rebellion," which, it is conceived, expressed the true view of martial law. And the officers gave evidence in entire accordance with it, and showed that they did *not* execute prisoners, except after such enquiry as satisfied them of their complicity in the rebellion.

The course to be pursued by the officers was indicated less by express orders than by actual example, and it was in accordance equally (*a*) with the instructions and the example of the Governor and military Commander. The officers, as they avowed, made summary examples of all rebels they found "red-handed," *i.e.*, either in possession of

number of prisoners from the rebel camp. *Finding their guilt clear*, and being unable to take or leave them, I had them all shot." This, be it observed, was three days after he had desired to be told what to do with prisoners, and after he had been told to deal with them summarily, and execute those "whose guilt was clear." (*Vide ante*, p. 139.) And he distinctly states that he "found their guilt was clear," which, they having been actually seized in a rebel camp, was pretty certain. In his evidence he stated that the constables stated that the prisoners were armed, and seen drilling with Bogle, and that he considered was enough to prove their complicity with the rebellion, as surely it was. It is to be presumed that the object of the Secretary of State's notice of the passage was, to elicit whether there had been any enquiry; and it appeared that there had been such as could be made under the circumstances. Assuming this to have been so, the act of this officer was only, in substance, such as had been done by all the officers, and the General himself, that he executed prisoners whose guilt he deemed clear.

(*a*) Captain Hole's evidence:—"His Excellency asked me what my orders were, and I told him 'to proceed to Manchioneal, for protection of all the whites,' and that 'I was not to leave the road.' His Excellency said to me, as far as I can recollect, 'Captain Hole, if you hear of any rebels, go off the road, and make an example of them.' When he got to Manchioneal, a prisoner was brought in, with a quantity of stolen goods; he had a machette, sharp on both sides; his jacket was all covered with blood, not proceeding from any wounds; consulted with the officers, and we agreed to shoot him." So Colonel Fyfe stated that he shot a negro, whom he found wearing the ring of the Custos, who had been murdered.

arms, or of plunder, especially the property of those who had been murdered, or under other circumstances clearly indicating actual guilt, or upon clear and positive testimony of it.

So also, it was not less indicated by actual example by the General in command (*a*), that men who could either be shown to have taken part in the actual murders perpetrated, or to have threatened to take life (*b*), should be summarily tried and executed. And this example was, of course, followed by the officers (*c*).

The General himself (*d*) set the example of holding courts-martial, and not merely for the trial of those who had taken part in the murders, but of those who were merely implicated in the rebellion; at places where no murders had been committed, nor any acts of armed insurrection, but where, by robbery and burning of houses,

(*a*) Thus, the General in command (General Nelson) sat on a court-martial at Morant Bay; three prisoners were tried for participation in the massacre there, and were convicted, and sentenced to be hanged, one to be flogged, and another, a woman, to be hanged, but with a recommendation to commute the sentence to penal servitude for life. The proceedings were sent to him, and in the exercise of his judgment he did not approve of the recommendation, but ordered the sentence to be carried out.

(*b*) Thus, the General stated that one Hague, collector of customs, told him that one of the ringleaders had threatened his life, and was close by. "I sent out (said the General) a small party, under Captain Ross, to capture him, and they returned, bringing Flemming a prisoner. The next morning I ordered a court to assemble; he was tried, found guilty, and executed."

(*c*) Colonel Hobbs had men summarily tried and executed, for having twice gone to the house of one Patterson, as was believed, in search of him, with intent to kill him. At all events, they were clearly guilty of a felony at common law, and a capital offence at common law, by committing plunder there. And positive testimony was given.

(*d*) Thus General Nelson wrote (20th October) in a despatch, evidently begun at Port Antonio, 40 miles from Morant Bay, the scene of the massacre. "A court-martial sat here (Port Antonio) and condemned several rebels to death. Having approved and confirmed, the sentences were carried into effect." At Port Antonio or at Manchioneal there were no murders, but burning and robbery of houses, &c. These, therefore, were deemed by the General acts of hostility justifying capital executions under martial law.

there had been what military men consider acts of hostility.

Whether looking to the express orders of the General (*a*) as to the measures to be taken, or the reports of measures taken, of which he expressly approved (*b*), or did not disapprove, it is manifest that he directed or sanctioned the summary execution of men not merely found with arms *in their hands* or in actual resistance, but men, in the military phrase, found in arms, *i.e.* found in *hostility*, or, as the Commander-in-Chief put it, taken red-handed, or believed, from circumstances of their capture, to have taken active part in the rebellion, and that the huts of real rebels might be burnt (*c*).

It was most distinctly stated (*d*), in the reports of officers

(*a*) General Nelson to Lieutenant Adcock, October 20. "All ringleaders to be secured; men found in arms to be summarily dealt with; care to be taken that firing of huts be *not carried to excess.*"

(*b*) Thus General Nelson 17th October, wrote thus of the measures taken by Captain Hole:—"The whole of his proceedings were temperate, decided, and judicious. All rebels captured, having been tried, he had instantly executed. In several houses he found plunder secreted, and razed them to the ground, and proclaimed that where he discovered spoil he would adopt a similar course." So Captain Hole to General Nelson:—"Manchioneal, October 19.—A great number of prisoners have been brought in by the constables of this district, all of whom seem to vie with one another to make amends for their late delinquencies by *capturing all the people concerned in the rebellion.* All rebels captured, not merely those found with arms in their hands, but those he had reason to believe had been active in the rebellion." Otherwise there would have been obvious absurdity. Men who had never had arms in their hands might have sacked a town, as Manchioneal was sacked.

(*c*) Thus Lieutenant Adcock reported (22nd October) that he had drumhead courts-martial assembled to try prisoners, and also of those sentenced to death; and he adds that his instructions only authorized him to carry out the sentence in cases of prisoners brought in by his own detachment. So Colonel Hobbs, on October 16, reported that he had had a rebel tried and executed, and so in other cases.

(*d*) Thus Captain Hole, an officer, whose reports the General most highly approved and applauded, wrote on October 19:—"Among the prisoners two were brought in, both of whom were engaged in *plundering and burning* the Mulatto River estate, Mr. Hinchelwood's property. I assembled a court-martial, and the two men were hung in the middle of

most distinctly approved of by the General in command, that men had been executed, not for the mere possession of plunder, but for acts of plunder or of arson, which were thus treated as capital acts of hostility under martial law, though of course they would not necessarily, and did not, in fact, involve the being armed or found in arms.

It did not appear that, in the view of the military authorities, the phrase "found in arms," was limited to those who were found with *arms in their hands* (*a*), or that it was used as a condition of this summary power of execution under martial law, upon enquiry, and evidence of active complicity; but that it was used as a condition of that still more summary power of instant execution in the field, *without* enquiry, which, of course, inferred, not indeed necessarily, that the parties should be found actually with arms in their hands, but that they should be found in some act, or position, of obvious hostility.

The military officers, it appeared, endeavoured to the utmost, in carrying out martial law, to apply it only to

this town." He went on to add a statement which showed the urgent necessity, under martial law, for speedy disposal of prisoners by summary enquiry. "I have deposed of several other prisoners by inflicting corporal punishment, but still there remains *a great number on my hands, and this is swelling every moment.*" This difficulty was pointed out in the reports of all the officers, and in the orders issued from head quarters (*vide ante*, p. 139). And if prisoners could not be summarily dealt with, the difficulty soon would be insuperable.

(*a*) This would exclude cases of men who had put down their arms, intending to resume them, or had left them in their huts and retired to the bush to avoid the military; so it would exclude cases of men found in the act of firing houses, or of men aiding and inciting others in the use of deadly weapons. The phrase "found in arms," seemed to be used in the sense of being found in hostility, *i.e.*, in the act of, or in some visible, obvious, unquestionable condition of hostility or criminality, what the Commander-in-Chief called being taken "red-handed," or what old lawyers called being taken *in the mainour*, which did not mean being taken in the *act*, but with such evident traces and circumstances of guilt, as left no rational doubt of guilt. But, at common law, at this time, no one can be killed, even *in the act*, unless it is necessary to kill, either to prevent felony, or to arrest a felon.

hostility, and to distinguish between that and mere felony, not connected with, or necessarily involving, hostility or rebellion (*a*). But, on the other hand, in a warfare against rebels, who waged *their* warfare against the loyal subjects of the Crown, not in an honourable and regular way, but by felonious acts of arson and devastation,—they did not consider that the only evidence of hostility was the use of arms.

It must be clearly kept in mind that, at common law, the military could not lawfully kill or inflict sentence of death, even in cases of men, not only found in arms, but even in cases of those found in *the act* of felonious outrage (*b*), unless the infliction of death was *necessary* to *prevent* the act of outrage, or to prevent the escape of the felon, or unless it occurred in the encounter with a felonious or rebellious body. And, therefore, martial law would be required to authorize even the execution of those found in arms, or with arms in their hands, or even taken in the act of arson or murder. On the other hand, in the view of the military authorities, the severities of martial law were not restricted to such cases (*c*), although, by military usage, the power of instant execution, without enquiry, might be so restricted.

(*a*) Thus it was remarkable, in the very letter of the volunteer officer, which more than anything else, perhaps, excited sensation in the public mind (*vide ante*, p. 242), it appeared that the mere being concerned in *plundering* was not deemed to require the infliction of death, but only of flogging. And it is believed, that no capital execution was inflicted by order of any officer for the mere *possession* of plunder, although, under the circumstances, it would be felonious, and *strictly* would be capital under martial law. So in the first despatch of Col. Hobbs (*vide ante*, p. 234), it appeared that he at first hesitated as to the execution of men not found in arms, but afterwards he found that most of the mischief was done *without* arms.

(*b*) *Vide ante.*

(*c*) Otherwise, it is obvious, it would lead to monstrous absurdities. A man seen setting fire to a house, even although persons were burnt to death in it, or a man seen to commit a murder, without what military men call "arms," or along with and helping those who were using weapons, could not be executed; but a man found with a weapon, although he had done no mischief, would be liable to be executed.

The officers stated, moreover (*a*), as they had in their reports, the circumstances of embarrassment under which they soon found themselves placed by the accumulation of prisoners, and the difficulty, or rather practical impossibility of guarding them, and the consequent necessity of dealing summarily with them in some way, upon summary enquiry, which is one of the primary and main difficulties to be met with by martial law, when the number of prisoners is far too great to be dealt with in the ordinary way, and they can only, from the nature of the case, be dealt with summarily.

The officers stated fully in their evidence, the circumstances under which (*b*), when prisoners were taken, they

(*a*) Thus, the gallant officer (Col. Hobbs), whose acts, or perhaps one might rather say whose words, were most assailed, wrote thus to his superiors, Oct. 13, three days after martial law; after first describing the deterrent effect of the execution of a rebel, which had just taken place. "He was tried this day by court-martial, and, after due deliberation, found guilty and shot. This has produced a wonderful effect throughout the district. Since the execution numbers of rebels have come in, having thrown away their arms, and seeking protection. These men I cannot possibly undertake to guard. They are embarrassing the troops, and I believe they are all worthy of death, but I shrink from the responsibility of executing them, without first hearing your wishes respecting them." It would be impossible more clearly or more properly to describe the difficulty, and he only did so in his evidence more fully. He had intimations that he must dispose of the prisoners as well as he could by summary enquiry, and his evidence, in substance, came to this, that he did so, that is, that he did the best he could under the circumstances. But the evidence showed that it would be idle to confine the military, under martial law, to taking prisoners. Three days later he wrote, "About daylight this morning, in passing through this village of cross-roads, where the rebels destroyed everything, I found a number of special constables, who had captured a number of prisoners from the rebel camp. Finding their guilt clear, and being unable either to take or leave them, I had them all shot."

(*b*) Col. Hobbs's evidence. He stated, "that at one place he found a large body of persons with badges there, who said they were special constables; they had eleven prisoners; they were taken up as being engaged in the riots and connected with murder. I was asked not to leave them, as the district was full of rebels, and they might be taken from them; and as I learned from a corporal of volunteers, who was there, that they were notorious rebels, I assembled a drum-head court-martial to try them; the court consisted of three senior officers; not having a bible, I made them

dealt with their cases, either summarily, if they were taken "red-handed," or if not, then by trial by court-martial, and they also described the manner in which these trials were conducted, with a view to show that they were fair and careful trials, with a view to attain to the truth and to do justice.

The more particular demands for explanation on these matters resolving themselves, as already pointed out—except as to some circumstances of propriety—into more *general* questions, so the explanations of the officers on these particular matters resolved themselves into their general explanations (*a*), and amounted to this, that in these executions, on summary enquiry, although in some instances the mode of alluding to them in hasty reports might have been inconsiderate, their real actions at *the time* had not been so; but that they had taken such measures as they could to satisfy themselves of the guilt of those executed.

hold up their hands and swear as they do in Scotland; and they were tried as carefully as they possibly could. The volunteers and special constables who had taken them, stated that they were concerned in the murder of the Baron and Mr. Price, and that they were all Morant Bay offenders of the 11th of October; they were all found guilty, and sentence of death was reported to me. I went to the prisoners, told them the sentence, and asked if they had anything to say—all confessed except one man—was about to release him, when one of the constables came up and said that he was the worst of all; he then acknowledged that that was correct, but that he was compelled to join the rebels. They were all shot. I appealed to the officers to know if there was a dissentient voice as to the sentences; all agreed, and my own conscience was satisfied.

(*a*) Thus, as to the passage in Colonel Hobbs's despatch:—"A great number of prisoners whom I shall have to shoot to-morrow," he explained it as meaning no more than a passage in a report of the General's, to the effect that, as the evidence was strongly against the prisoners, he believed it would go against them. And he entered into statements to show, that in fact, the cases of the men were carefully considered. And the fact that on the very day after that despatch, out of 50 prisoners tried, only 27 were found guilty, went strongly to show that there *had* been some care taken, and that the men were not recklessly shot in batches. So as to the passage (*vide ante*, p. 344), that men were shot whose guilt was clear, he went into explanation to show that their guilt *was* clear to him at the time.

The officers (*a*), far from maintaining that they were at liberty under martial law to have prisoners punished or executed recklessly, showed in their evidence that they had certainly used some means and taken some care, either upon summary enquiry or by courts-martial, to satisfy themselves as to the guilt of those who suffered; and they sought to show that they had taken sufficient means and used sufficient care under the circumstances (*b*).

From the number of the prisoners (*c*), and the pressing necessity for disposing of their cases as speedily as possible, it was hardly possible to keep written notes of all the evidence in each case; and all that could be stated, either generally or when particular cases were challenged, was to state that witnesses had been examined; but in some instances it was possible to state the substance of the facts they deposed to (*d*).

(*a*) Thus, Colonel Hobbs, having in his despatch, dated midnight, 19th of October—written as above—stated in his evidence:—"On the morning of the 20th, drumhead courts-martial were assembled—out of 50 prisoners tried, 27 were found guilty; I was not present myself, but Captain Field and the officers were very careful. The prisoners were drawn up in a line, and each tried separately, on the evidence of constables; these courts were held under my authority. I read over the evidence first, and sent no one before the court, except I was satisfied with the evidence against him; about ten or a dozen were discharged, and about 27 executed; all beyond 27 of the body of 50 were let go, from insufficency of evidence; all were tried by courts-martial as far as convenient; the proceedings were all sent to the General commanding. Special constables brought in prisoners, who they stated were armed and seen drilling with Paul Bogle; that was, I consider, enough for me to say that they had joined Bogle.

(*b*) That *some* care must have been taken, is manifest from the fact that so large a proportion of the prisoners were released, or suffered only *minor* punishment. How far *sufficient* care was taken, was for the Commissioners.

(*c*) Hundreds at this place alone.

(*d*) Thus, as to Carr's case, it was stated:—"We held a Court of Inquiry: the Court was formed at the request of Colonel Hobbs; a man named Billy Carr was brought before us at about 10 o'clock in the morning; we heard the case, and sent it to a court-martial; we held only preliminary enquiries, and we handed the result of such inquiry to the court-martial; we considered Carr was a rebel ringleader; we examined several witnesses, who saw and heard him giving directions to the people at Morant Bay. So in the case of the thirteen men shot for having gone into the house of a white

There was very strong evidence (*a*), not only on the part of the officers themselves, but of others present, that the officers, in cases of summary executions, had used as much care as they reasonably could, under the circumstances, to satisfy themselves as to the guilt of those who were executed, upon the information of witnesses, that they had been taken in open rebellion.

The explanations of the officers as to statements in their reports (*b*) as to attacks upon parties or bodies of men at

man named Paterson, *in* search of *him*, and with intent to kill him; a witness was examined against them, (the servant), and it does not appear that there was any reason to doubt the truth of the statement, especially as the men had been *twice* to the house, and been in it some time. And the Colonel was careful to ascertain if any who were accused had been *working* since the rebellion; and whether, even if not, they had been seen with the rebels. If not, then, although there was strong *prima facie* evidence of complicity in the rebellion, the *capital* penalty was not inflicted. (Ev. of Williams.)

(*a*) Thus, a person who was with the troops and saw eleven persons shot at Chiego Foot Market, by orders of Colonel Hobbs, said:—Colonel Hobbs got them in a row, and the constables swore that they caught them in open rebellion; Colonel Hobbs made the constables hold up their right hands, and swear before God and their allegiance to Queen Victoria, and the constitution of Jamaica, that they saw them. The constables pointed out each man whom they identified, when they were placed in the line; some of the constables swore, I saw this man in open rebellion; or I found them plundering, and so on. The constables used the words "open rebellion," and occasionally specified particular acts which took place. Colonel Hobbs was not on the court-martial. Those at Chiego Foot Market were not questioned individually; if they had had anything to say, I think they would have been heard." From this it is to be inferred that they did *not* say anything, and did *not deny their guilt*, as they naturally would have done if not guilty.

(*b*) Thus Captain Hole reports on 17th October, 1865, (*vide ante*, p. 235). "The effect was that *in a district which had been the scene of devastation*, every black man who did not stand at our approach, to give an account of himself, was shot." The proceedings of this officer were expressly approved by the General in command (*vide ante*, p. 346), and, it must be taken, were in accordance with military usage. He naturally enough assumed that the male inhabitants of huts filled with plunder were engaged in the rebellion, and it was to be inferred from his report that the rebels killed in firing these huts, were in or about the huts, and implicated in the plunder which had been going on. Then, as to the occurrences at Manchioneal, there the blacks had risen with cries of death to the whites,

a distance, were, in substance, that they were found in or near to scenes of outrage or devastation, in which they must have been implicated, and in which their flying or refusing to give any account of themselves raised a probable presumption of active complicity in the rebellion, and the acts of outrage which accompanied it.

That the comments made upon some passages in military reports of the officers had arisen in a great degree not only from misconstruction of careless expressions, but also from misconception as to the lawfulness of their proceedings, was manifest from this, that the substantial objection (*a*) in all the cases came to this: that parties of men had been attacked or executed, who were not found in actual *resistance*, or with arms *in their hands*, although they appeared to be active in the rebellion. It appeared, however, that in the view of the military authorities, as it was not regular war in which they were engaged, in which

(*vide* evidence of Burke), and were actually engaged in firing the houses. There was, therefore, a violent presumption that the blacks found in the vicinity, and who durst not stand to give an account of themselves, were guilty of complicity in those acts of outrage; and, if so, then they were liable, by military law, to instant execution. A whole town having been sacked by hundreds of rebels, the execution of sixty would not necessarily be very excessive.

(*a*) An objection, evidently arising from the erroneous notion as to the scope of martial law already combated in the previous portions of this work (*vide ante*, p. 83). Thus, as to the passages in Colonel Hobb's reports referred to by the Secretary of State (*vide ante*, p. 234). "We secured six persons, whom I would have shot, but from the fact of their being unarmed. I now regret I did not do so, as they are no doubt rebels." As to the prisoners—the reports of other officers approved by the General—and of the General himself—showed that it was deemed that persons who appeared to have been active in the rebellion, were liable to be executed, whether or not they were taken with arms *in their hands*; and it was an error to suppose that this fact was *necessary*, for a man who never had a weapon in his hand, might have burnt a house, or helped those who had weapons. Then, as to the shooting at a body of men at a distance, it was done in other instances without exception (*vide ante*, p. 156), and bodies of men in open rebellion were presumed to be in hostility. And as to the passage "Shot a great number of rebels on the way," it has its exact parallel in the report of the General himself. (24th October.)

men found in arms are entitled to be treated as prisoners of war, but war against rebels and criminals, who, *even* if found in arms in open encounter, were *not* entitled to be so treated, but were liable to be treated as criminal; so, *à fortiori* (*a*) those who were *not* found in arms, but were guilty of criminal outrages, which would be irregular even in enemies entitled to the rights of belligerents, acts of private depredation, arson, &c., were liable to be summarily dealt with, under martial law, as criminals.

And this seemed almost implied in the Secretary of State's despatches (*b*). It will have been observed (*c*), that the Secretary of State had directed some of his interrogatories, especially to executions, upon summary enquiry. It being of the very essence of martial law, that it involves a power of military punishment, either on summary enquiry or upon trials by court-martial; and the military officers having to decide when the summary enquiry should be deemed sufficient without more formal trial, the enquiry into these summary executions, as into other measures taken, would be directed rather to the propriety than the legality of the executions or punishments that had taken place. And the very enquiries made appeared to imply, that summary executions of prisoners might take place, if, upon such enquiry as was proper under the circumstances, they were believed to be guilty of active insurrection.

(*a*) Even in a regular war, in which *primâ facie*, those who are engaged in the service of the enemy are entitled to the privileges of war, if they are only found in arms, engaged in open and honourable warfare; they are *not* entitled, if found without arms, engaged in acts of depredation or outrage not sanctioned by the usages of war, nor under lawful military authority, as where soldiers become mere marauders, and commit acts of outrage, such as robbery and rape, murder, &c. These are liable to be executed *either* by their own general or the enemy.

(*b*) *Vide ante*, p. 244.

(*c*) It is distinctly recognised and cited in the Petition of Right (*vide ante*, p. 11, p. 93), where it is shown that only such enquiry is necessary as can be made under the circumstances.

As regards the means taken to satisfy themselves that prisoners had been active in the rebellion, the explanations of the officers amounted (*a*) in effect to this, that they had acted according to the usages of war, and had applied, in the best manner they could, under the circumstances in which they were placed, the principles of probability, or presumptive proof, admitted in any criminal courts. That is, that they applied to bodies of men the *principles* of presumption and probability, which, at common law, are applied to *individuals;* and as, at common law, a man found in possession of goods recently stolen, is presumed to have been the robber, so, if they found a place recently sacked, in possession of or just deserted by a body of negroes, or found a number of huts recently left by them, filled with plunder and with arms, they presumed that, as a body, these men were engaged in the rebellion, that is, that they deemed circumstances, raising a probability of active complicity in the rebellion, sufficient, in the absence of explanation, to warrant a conviction.

(*a*) Thus, in the case of *The King* v. *Burdett*, 4 B. & Ald. 122, which is the "leading case" on this subject, and in which the doctrine as to presumptive proof is laid down. Best, J., thus laid down the law as to presumptive proof:—"When one or two things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact, not proved, should be established by irrefragable inference. It is enough if its existence is highly *probable*." So, in the same case, Bayley, J., said:—"No one can doubt that presumption may be made in criminal as well as civil cases. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief; and so in other criminal cases." Thus, Gen. Nelson, in his despatch of Oct. 15, mentioned it as a proof of the guilt of one man, that he wore the clothes of one of the victims of the massacre. So, Col. Fyfe shot a man he found wearing the ring of another of them. So it was stated in a despatch of Capt. Hole, 19th Oct. "that three of his men had shot three rebels as concerned in the murder of Mr. Hire, and brought back with them two cartloads of recovered property, some of which belonged to Mr. Hire (as in one of the pockets of a coat he discovered two letters), and some to Mr. Shortridge (the same being discovered by the crest on two plated teapots)."

The same general principles were applied either as to attack or summary execution (*a*), and it is conceived that mere error, or even some want of proper care, in the application of these principles, would not in any particular cases, even if innocence were proved, necessarily invalidate the legality of the executions (*b*), however it might involve some culpability, and call for some amount of censure.

The explanations of the passages in their reports, as to executions of prisoners (*c*), of which explanations had been de-

(*a*) That is, speaking generally, men were attacked or fired at, if they could not be got at to be captured, when they were in bodies, under such circumstances as to raise such presumptions of their being engaged in the rebellion, as would be deemed *primâ facie* to justify their execution *when taken;* and, on the other hand, men taken under such circumstances were deemed liable, in the absence of exculpatory evidence, to execution. In several instances it was found that, even after sentence, the officers were ready to listen to any exculpatory evidence.

(*b*) It is not every degree of carelessness which renders a man *civilly* liable; there must be a want of such care as men *ordinarily* show. And this, it is obvious, only applies to ordinary circumstances, and a much larger measure of indulgence would be due to men acting under circumstances extraordinary, and in a great public emergency. And far more than carelessness is necessary to render an act, otherwise lawful, illegal.

(*c*) Thus, Col. Hobbs, 19th Oct. (near Stoney Gut, the seat and stronghold of the rebellion). "About daylight this morning, in passing through this village or cross roads (where the rebels have destroyed everything), I found a number of special constables, who had captured a number of prisoners *from the rebel camp;* finding their guilt clear, and being unable to either take or leave them, I had them all shot; the constables then hung them up on trees, eleven in number." The explanation here was easy and obvious, that the men had been taken in the rebel camp, and on that scene of actual devastation, and that their guilt *was* clear. Then, as to the passage, (*vide ante*, p. 235), as to one of the rebels, who said, "he knew every single rebel in the island by name and face, selecting the captains, colonels, and secretaries out of an immense gang of prisoners just come in here, whom I shall have to shoot to-morrow morning." The explanation was, that the man, no doubt, was a rebel, who *did* know the ringleaders, that he *did* point out the ringleaders (who could hardly be discovered except in some such way), that the circumstances left no reason to doubt his statement, but rather confirmed it, and that the men were not executed without consideration of these circumstances. If they were the "captains colonels, and secretaries," it should seem that it might be justly deemed that they ought to be shot, seeing that from this place the murderous bands

manded, came, in substance, to this, that under the circumstances, or upon positive testimony, it was believed that their guilt was clear, and that no men were executed without reasonable ground for believing, either from the place or circumstances under which they were taken, or from positive testimony, that they had been actively engaged in the rebellion.

As regarded, therefore, cases (*a*) in which men had been summarily executed, upon being pointed out by police officers or others, as having been engaged in acts of insurrection or felonious outrage, these, it is manifest, would depend upon whether they denied the charge, or whether, if they denied the charge generally, they denied only the specific fact stated against them, which would prove their guilt, as that they had been present at such and such an occasion, &c.

It did not appear from the evidence that men, with the sanction of the officers, were shot and executed, unless *either* taken in the field in apparent hostility—or red-handed—or on some kind of trial or enquiry, and testimony of some specific facts, showing complicity in the rebellion or insurrection. And though men were, in some cases, shot by soldiers, in the absence of officers, without sufficient testimony, it was, it is believed, almost always on some sort of testimony that the men were rebels (*b*).

chiefly came who perpetrated the massacre. And it will be seen that there *were* captains and colonels, &c. (*vide ante* p. 281). And this man said he knew them.

(*a*) For confession, it is manifest, would dispense with further proof, as might circumstances showing guilt, without express evidence; for instance, the possession (unexplained) of property of those murdered. And confession might be implied as well as express; and admission of facts, showing guilt, might be in effect a confession of guilt.

(*b*) Thus those ordered to be executed, as being stated to have been taken in the rebel camp (*vide ante*). So of the men executed for going to Mr. Paterson's house in search of him with intent to kill him. (Ev. of Mr. Paterson, and E. Williams.) So of the men taken on the road, while they were drumming for the rebels and shot. (Ev. of Eady.) And so Ev. of Burke: "Saw people shot by the soldiers without trial; saw them shoot people as

It appeared (*a*) that in most cases where men were executed summarily by soldiers, with or without order of officers, the soldiers had seized the men almost in the act; that is, in the place which had just been the scene of felonious outrages; and under such circumstances as could leave no reasonable doubt of their guilt. They would come upon towns or places which had been pillaged, and the constables or inhabitants would point out the men who had been engaged in the pillage, and in whose houses traces of the plunder would be found.

The officers must necessarily act upon evidence of others, either positive and direct, or circumstantial (*b*), and no rule of law required any particular number of witnesses, or the highest possible degree of certainty. If there were any positive testimony, even though it were the testimony of a single witness, or if there were circumstances to raise any probable presumption of guilt, it would not affect the legality of the sentence, that others might consider it, under the circumstances, rash to act on such a probability, or on such testimony.

the constable pointed them out; there was no officer there." So in the case of a black soldier, who shot ten prisoners in the absence of an officer.

(*a*) Thus, for instance, at Manchioneal, which had been sacked by the rebels: when the soldiers came they were stated to have seized and shot men as the constables pointed them out. And in one case they were said to have gone into houses and shot men; but in these instances it must fairly be inferred that they found traces of recent pillage, and had also been informed that the men had been engaged in the acts of pillage which had just been perpetrated. In such cases, also, it appeared that the officers were not present. It appeared that even the soldiers, before they shot a man, would ask if any one knew that he was a rebel (ev. of West), and would not shoot him unless this was testified by some one.

(*b*) It was in the instance in which Colonel Hobbs executed several men for an outrage in the house of Mr. Paterson, on the testimony of a woman, a servant who spoke *positively* to their identity. How far it was or was not right to act, on such testimony, would depend entirely on circumstances. In courts of justice, prisoners are often convicted of felony on the testimony of a single witness. It is entirely a question of credibility, of which the jury would judge from the circumstances. For instance, the men might by their demeanour have virtually admitted their crime.

The evidence (*a*) showed that the General in command and the officers were quite aware of what the obligations of natural justice, and the usages of the service, required in trials by court-martial, or on the most summary enquiry, viz., that evidence should be taken; and that the prisoners should be heard in their defence, either in the way of cross-examination or observation. And they stated that these requisites were attended to.

The officers were perfectly aware that the rules of natural justice required that on the most summary enquiry there should be evidence (*b*), and in no instance did it

(*a*) Thus it was stated that the General in command always looked for the most conclusive evidence before he executed a man. (Evidence of Hague). This, no doubt, was, in capital cases, a proper precaution, though it was not, perhaps, strictly necessary, since no more could be required at common law; still it was the safer, and, therefore, the proper course, though a less degree of care would not be necessarily culpable. It was sometimes attempted to show that men had been punished without evidence; but it was always found that there had been witnesses. (Evidence of Paul, as an example). So Captain Astwood stated: "I sat on one court-martial at Morant Bay; men were before the Court, charged with being either privy to murder, or sedition, or riot and rebellion, as the case may be; evidence was adduced before the Court, and prisoners were allowed every opportunity of cross-examining witnesses, and putting questions to them, and no man was sentenced except it was proven that he was taking part in the riot or committing murder; the prisoners cross-questioned the witnesses, and some did so very cleverly. I sat upon a court-martial at Golden Grove. Took no notes myself; Colonel Lewis presided at the Court in Morant Bay, associated with Captain Espeut, and myself as junior Captain; I think eight or ten prisoners were tried. The rules were, that all should be tried conscientiously, and the oath I think was taken from the Mutiny Act."—See also Ev. of Lewis and Espeut.

(*b*) Thus Lieutenant Astwood stated, "A man was brought in by constables. Three volunteers and some officers were standing in a group—evidence was that he aided and abetted in the outbreak, and he was ordered to be shot. There were two persons brought before us, one was ordered to be detained." So in the case of Mitchell. A witness stated that he said, "Oh you are going to Morant Bay, they will chop your head off," &c. The witness was sworn; there was no record taken; they heard him and his Overseer's evidence, and the man was executed. Captain Adcock, Captain Astwood, and Mr. Harrison sat on the Court." When they heard that he had threatened to take the witness's life, he was executed.

appear that an officer, or the Provost Martial had ordered the infliction of death without evidence, in the presence of the prisoners (*a*); and the discrimination shown in the sentences, and the release of many, showed that there had been a real desire to do justice, even although it may not always have been accompanied with the highest possible degree of care.

A good deal of evidence was given (*b*) with a view to

(*a*) Thus Major Prendeville, one of the Provosts Marshal, said distinctly—"*I never ordered a man to be flogged, except on written or oral evidence.* I took written statements sworn to before magistrates. They were almost invariably accompanied with the persons who deposed to it; I don't remember one case without the defendant being present; I always read over the depositions, and then made the deponent confirm it." And then, further, as to executions. "The only persons hanged were three, and you have the evidence upon which they were condemned, before you. Denton made a statement before me—he would insist doing so, although I told him it would be used against him before the court-martial—I cautioned him, and he insisted. So one March stated that on Thursday, the 12th October last, people entered the town of Bath that day blowing horns; there were two batches of 100 each, armed with cutlasses, bayonets, guns, and harpoons. They went to Mrs. Hitchens and demanded powder of her. She said she had none. They demanded the keys of the several shops and opened them; they took out of Mr. Ford's store especially guns and cloth; they escaped to the market that day, and can't tell where they went; when I came back the Maroons and soldiers were in Bath. Several prisoners were brought in by the Maroons; was present when they were tried, &c. He himself saw among them some of those who had plundered the stores, and recognised about ten, though he did not give evidence against any of them; they were only flogged. But afterwards a man being recognised as one of those at the massacre, he was executed. This may have been hasty, but it was manifest it was honest, and it was really *believed* he was guilty.

(*b*) Thus March stated:—"On my return to Bath on the 19th or 20th, I called at Leith Hall, and I saw Ford's Irregular Cavalry, and Astwood's Mounted Volunteers riding into Leith Hall; I followed them in, and heard the people tell the officers that they had some prisoners; the prisoners were brought out, and just at that time some of the 6th Royals and a corporal of the black regiment brought in some more prisoners, and they were all placed together; all the prisoners were flogged except one; about fifteen in all. They were not tried, as no court was formed or witnesses heard. Ford was there; Astwood, and an officer I think of the black regiment; two men were to be shot; one was removed, and the other was questioned; he had a wound, and said that he went to Morant Bay to buy medicines, and

show that due care was not taken in these summary enquiries; and, probably, in the confession in some instances, there was not so much care taken as would have been proper. Attempts were made also to show that on some occasions no evidence at all was taken (*a*), but this was disputed by the officers, who stated that either they or some one else had always investigated the cases and made an enquiry.

So as to the observance or non-observance, on these summary enquiries, of the rules observed on trials by court-martial; for instance, as to taking evidence on oath, it would rather be a matter of *propriety* than of *legality*; and the propriety would necessarily depend upon the circumstances of each particular case (*b*). Therefore it was

he discovered that he was wounded; they said, 'this is one of the Morant Bay rebels, shoot him,' and he was shot; all the volunteers were mixed up together; the officers agreed that the other man should be shot, but not until they returned; that was the man who was *not* shot." Now here, the very distinction made between the two cases showed that there had been an honest though hasty enquiry, and that there was a real belief in the guilt of the man executed.

(*a*) Thus Captain Astwood stated with reference to the evidence of the witness just mentioned:—"When I went to Leith Hall with a detachment of the Sixth, under Lieutenant Adcock, and some volunteers, I found a number of prisoners who were brought in by the constabulary and handed over to us; the women were dismissed, as invariably a rule among us is not to punish women, except they were actual participators in the massacres. Found five policemen and five constables, with twenty-five rebel prisoners; I considered that the force was too small, and I took charge of them myself. Received them on the road and took them over to the Clerk of the Peace, who ultimately committed them to be escorted by me, and I handed them over to the Provost Martial; I got a list of them from the Clerk of the Peace, and I gave the list along with the prisoners to the Provost Martial. Those who were caught in the woods it was ascertained had stolen property, and that they sided with the rebels. The Clerk of the Peace reported such to be the case to me, and upon such information I directed them to be flogged; he had first investigated the cases. The Clerk of the Peace told me that they got from thirty to fifty lashes; certainly not more than fifty; and no women were flogged. That was on the 24th or 25th of October."

(*b*) It was admitted that in some instances the witnesses who testified on these summary enquiries were not examined upon oath. This was not admitted designedly, of course, but only accidentally, from the absence of

no doubt with reference to these considerations of propriety, the Commissioners entered into all the circumstances as to these summary executions.

Moreover, from the necessity of the case, many of the matters which were subject of enquiry (*a*), were not merely matters for military judgment at the moment, but were incidents and circumstances which were matters of personal observation and opinion, and could not possibly be reproduced in the form of legal proof, even by the parties themselves stating what they saw or heard; seeing that it is often practically impossible to reproduce in the minds of others the impression made upon one's own, by things which are matters of eyesight and hearing, as they occurred at the instant.

And the want of proper care, as it would not (*b*) take away the legal justification in the *same* case, so, *à multo fortiori*, it would not take it away in others. No amount of mere actual excess in honestly carrying out martial law, *i.e.*, excess as it *turned out* in the event, would deprive those

a copy of the Scriptures. No doubt it would have been a proper measure of precaution to swear the witnesses; though it should be borne in mind that a person wicked enough to give false evidence in such cases, would probably more be influenced by fear of punishment than the violation of an oath; and witnesses who gave evidence wilfully false, to convict innocent men, would be liable to punishment for conspiracy.

(*a*) This was particularly so of the matters most subject of stricture and enquiry: as the shooting of men pointed out by informants as rebels; as for instance, in the case of Colonel Hobbs (*vide ante*), which was one of those primarily the subject of inquiry. It is obvious that the propriety of this would entirely depend upon the impression of truthfulness conveyed at the moment, and under all the circumstances; for example, the demeanour of parties accusing and the parties accused; whether the former were direct, and firm, and specific in their accusations, and supported by surrounding incidents and circumstances; and whether those they accused denied the charge; or, if so, whether faintly or firmly, and whether able to support their denial by any circumstances; or whether they rested on bare general denial, and if so, whether their general denial was obviously falsified to some extent by known facts; and so on. Then again, whether a man who threatened an officer—as in the case of Marshall—*meant* it as a deliberate threat to kill him, and as an incitment to sedition, would depend on the *tone* and manner at *the time*.

(*b*) *Vide ante*, p. 356.

who acted under it, of the protection and excuse which it affords; because it would not necessarily amount to abuse, and the doctrine (*a*) that an abuse of an authority of law takes away a justification, only applies to an *entire act* done under *common law* authority; and does not apply, even then, to mere excess in *fact*, but only to *abuse*; which involves more than mere excess, and signifies a wilful, or reckless, or conscious excess in the doing of something which is, or may be, *known* not to be covered by the authority.

However excessive might be the severities of the measures taken, under martial law, for the suppression of the rebellion, the excess would not necessarily amount even to an abuse of martial law, still less take away the protection or

(*a*) This doctrine is, at common law (8 Coke, 146), that when a man *abuses* an authority of law (*i.e.* common law), he becomes a wrongdoer *ab initio*, and cannot justify at all; as if a landlord in distraining, or a sheriff in levying, turn the party out of his house (*Taylor* v. *Cole*, 1 Hen. Blackst. rep. 355; *Etherton* v. *Popplewell*, 1 East, rep. 139); or remains, beyond the time allowed by law, a long and unreasonable time in possession; (*Winterbourne* v. *Morgan*, 11 East, 395; *Aitkenhead* v. *Blades*, 6 Taunt. rep. 198; *Ash* v. *Dawnay*, 8 Exch. rep. 240; *Peppercorn* v. *Hopman*, 9 M. & W. 618; *Playfair* v. *Musgrove*, 14 M. & W. 239). But in these cases the law allows a definite time to do a definite act—to distrain, to levy, or the like; and the staying longer than necessary for it, or the doing something quite different, is wilfully unlawful. The mere excess in degree, without wrong motive, has not the effect, as, if a magistrate remand a man for examination an unreasonable time, he may be liable for the excess, but does not lose his justification. (*Davis* v. *Capper*, 10 B. & C. 28; *Cave* v. *Mountain*, 1 Man. & Gr. rep.) "He who wilfully and knowingly violates the law must take the consequences." (Lord Arbinger, C.B.; *Kirby* v. *Denby*, 1 M. & W. 336); and so it is in the abuse of an authority by cruelty, as in excessive beating. (*Oaks* v. *Wood*, 2 M. & W., 355.) There, however, the act is entire, and the excess must be such as that the party knew or might have known it to be wrong. But, as already observed (*vide ante* p. 304), this doctrine of excess, in a legal point of view, has no application to distinct acts; as when a policeman beat a woman with a truncheon, having lawful authority only to turn her out of the house. Still, even there, it was a defined common law authority to do a definite act; and going beyond it, with needless violence and *wilful* excess, and excess *known* to be unlawful. This cannot apply to mere excess in the exercise of a discretionary authority, for a military object, dependent on military judgment.

excuse which it would afford to who really, however erroneous, or excessively, acted under it, and for its object. That might turn out to have been, in fact, excessive, *i.e.*, more than was necessary, which, at the time, might appear necessary, and excess might arise from mistake in matters of fact (*a*), entirely innocent, or from error of judgment, little if at all culpable, or from some degree of rashness or carelessness.

How far the officers, in their evidence, succeeded in showing that they had taken sufficient care in these summary executions, it is not within the province of this work to enquire; it is enough to say that they sought to show it. But it is proper to observe that, in doing so, they were placed in a position of great difficulty and embarrassment. The Commissioners not only received the statements of the officers, and cross-examined them thereon, but also received inculpatory statements from any one, and, indeed, invited all parties to come forward and make statements, inculpatory or otherwise (*b*), and thus received specific charges of speci-

(*a*) Of a military nature, for instance, as to the numbers of the population actually engaged in the rebellion, or the proportion of the population disposed to join in it, and only deterred from doing so by means of the terror inspired by measures of military severity; the proportion of them armed, or of the extent of organisation, or of the strength of the positions they might take up, or the military force at command, or the prospects of reinforcements, or a variety of other matters, as to which, more or less, the Governor and military Commanders would have to go by hearsay, or rumour, or report, or estimate, probably very erroneous; or, *as it might turn out*, after the event, exceedingly exaggerated. But they would have to decide at the moment, and mere mistake of fact, or erroneous judgment, might lead to great excess, and be perfectly innocent.

(*b*) Not, indeed, that they invited accusations expressly, but they invited all persons to come forward and make any statements which could throw light on the subject of their enquiry, and they received these statements, although they were inculpatory, and although they related, not to the general nature of the measures adopted, but to particular instances of alleged cruelty or excess, and though they were put forward as wanton acts, and, therefore, as crimes, and so not within the scope of the enquiry. And, further, they received any statements of this kind, as to the acts of private soldiers, or volunteers, not only without evidence that these acts were

fic instances of alleged excesses or cruelties. These, of course, could not be allowed to pass without such answer as could be afforded; hence they were involved, in reality, in taking evidence on a vast number of particular cases, and thus the Commission assumed the form of a vast fishing inquisition, and of an informal trial of a great number of alleged cases of misconduct, or criminality.

The *onus* of proof was here completely reversed, and those who had been suddenly called upon to discharge a trying and arduous duty, and save a colony from massacre, were virtually put upon their trial, loaded with the most cruel accusations (*a*), and forced to justify themselves as best they might, and to do so, also, by strict legal evidence.

A good deal of evidence was given as to men taken prisoners singly, on the roads or in their houses, or elsewhere, and summarily executed, on the charge of having been engaged in the rebellion. It being of the very essence of martial law to establish a system of punishment, more speedy and more terrible, and, therefore, more deterrent, than the proceedings of ordinary law (*b*), the legality

done by order of any officer, but, although, from the nature of the acts, it might be presumed that they were not so, and though it appeared that the officers were absent at the time, and knew nothing of the alleged acts.

(*a*) Accusations of wanton cruelty, and of the infliction of death without any cause or reason. All that the officers could say was, that in all cases they had acted either on the evidence of circumstances or on positive testimony, and upon what seemed at the time good grounds for belief. But if they were examined, as if it lay upon them to bring forward legal evidence of the guilt of the persons executed, and as though they were responsible for not having got such evidence, it is not to be wondered at, that they might, in some instances, appear to fail.

(*b*) *Vide ante*, p. 83. If large bodies of men were engaged in a wild system of plunder and devastation, and, on the approach of the military, either retired into their houses or the "bush," to escape detection or avoid encounter, as they would evidently be ready, on the withdrawal of the military, to resume their predatory course, it would be idle to allow them to escape with impunity, and they could only, by reason of their numbers, be deterred from pursuing their course by speedy and terrible punishment. Their being within houses would no more entitle them to immunity from the measures of severity incident to martial law, than their being in the bush, assuming their guilt to be clear; and their being taken singly and

of these measures would rest upon the same foundation as the legality of so dealing with prisoners taken in bodies; there being an enquiry to satisfy the officers of their guilt, their propriety, in particular cases, would depend upon the degree of care taken.

And the importance of *deterrent* measures, as of the essence of martial law, would have a material bearing upon one of the main heads of enquiry, viz., as to the propriety of the *continuance* of martial law (*a*). For if, as has been shown, the scope of martial law is far wider than resistance, and extends to, and embraces, all means and measures necessary for thorough suppression of the rebellion, then the mere fact that the terror inspired by these deterrent measures had put a stop to resistance or actual insurrection, would be no reason for *discontinuing* them, so long as it

not in bodies, would not make them less liable to summary punishment; and, on enquiry, their guilt was found to be clear, though their being found in bodies, would of itself be a fact against them. And if it were lawful to deal summarily with prisoners taken in bodies, it would be equally lawful, upon enquiry, to deal so with men taken singly; while, on the other hand, if it were unlawful to deal with *prisoners at all*, then it would be equally unlawful, whether they were taken singly or in bodies.

(*a*) In truth, the necessity for and importance of *deterrent* measures, which, in the author's view, are of the very *essence* of martial law, lies at the root of the whole question, and of every part of it. Thus it is, that the summary executions were vindicated, of prisoners taken singly or in bodies, *ut supra*. Thus it is, that the continuance of martial law, after actual insurrection ceased, was vindicated. It was said, that martial law should have been withdrawn when resistance ceased; but it was forgotten that the resistance had ceased *only on account of the terror inspired by martial law*, and, therefore, that there was every reason to believe that, at all events, until a larger military force was distributed throughout the island (*vide ante*, p. 220), the insurrection would be renewed. Those terrible measures which were adopted, those summary executions, which struck terror into the population, who had been indulging in pillage and devastation, those very measures, and those alone, *produced* the cessation of resistance. But terror is a motive which is purely temporary, and its influence endures only so long as the *cause* of the terror. And if martial law, or those terrible measures had been withdrawn, the opinion was, that the immense numerical preponderance of the blacks would soon have given them courage to renew the insurrection.

appeared that the *spirit* of rebellion was still unsubdued, and that there was still a disposition to *renew* it.

The more those matters as to summary executions were considered, the more manifest it became (*a*) that, so far as regarded their *legality*, they resolved themselves into the general question, already discussed in previous portions of this work,—what is the true scope of martial law? and whether it is limited to measures of resistance, or includes all such means and measures, and, therefore, especially, essentially, and above all, such *deterrent* measures, as may be deemed necessary to the thorough suppression of the rebellion, and prevention of its renewal.

The question of propriety, as to the degree of care taken in these summary executions, and how far it was less, not merely than might have been taken (*b*), but less than,

(*a*) For it is manifest that, if martial law is limited to measures of mere resistance or arrest, as the military are, when acting in aid of the civil power, any execution of prisoners, however clear their guilt, even although seen to commit murder, would be illegal. If, on the other hand, the scope is suppression, and deterrent measures are allowed, then any executions on summary enquiry would be *legal*, supposing that enquiry real and honest, however erroneous, or hasty, or rash; and these matters, which might be highly censurable or culpable, being matters of degree, would be matters rather of propriety than legality. And, whether the prisoners were taken singly, or in bodies, on the road, in their houses, or in the bush, would only be circumstances in their cases, circumstances to be considered, but not conclusive one way or the other.

(*b*) The highest *possible* degree of care is never necessary, according to our law, even in criminal trials, not even when they are capital. Thus, there is no power, by our law, of adjourning a capital trial, although it comes out that a witness is absent who might throw light on the case. And juries may convict on evidence which is not conclusive, and often do so convict, against the opinion of the Judge, and of every lawyer in court. Such instances are frequent at the assizes. Our law of criminal procedure is still somewhat rough and prompt, and retains not a little of the barbarity of its origin. The procedure in foreign countries, though in some points far inferior to our own, is certainly, in some respects, far more slow and careful. The difference has been illustrated in a very interesting work by Mr. Fitzjames Stephen, on Criminal Procedure. It would be too much, then, to expect from military men, on summary enquiries, the highest degree of care. Reasonable care, *i.e.*, care reasonable under all the circumstances, would be the utmost that could be expected. And less than this,

under the circumstances, ought to have been taken, involved from its nature an enquiry, embarrassed with infinite difficulty, both to the Commissioners and the Officers. For it depended upon all the circumstances in each case; as to which it was easy, on one side, to give evidence ignoring all circumstances of guilt; and difficult, on the other side, without notes, and with imperfect memory, to give positive evidence of such circumstances.

It appeared that the General in command considered that, above all things, the power of life and death in the disturbed district rested with him (*a*), that it was for him to issue orders as to the course to be taken in the disposal of prisoners, whether by summary enquiry or court-martial; that it was for him to give orders to carry out the capital sentences. And there was a great deal of evidence (*b*), as to the humanity, and care, and consideration with which he had used and exercised this authority.

although it would be censurable, would not necessarily be culpable; nor, if there were *any* degree of care, would it be *criminal* or *illegal*.

(*a*) Thus, General Nelson stated that he gave orders as to the carrying out of executions. For instance:—"Morant Bay. The men convicted yesterday will be hung to-morrow morning. You will be pleased to have sufficient men to carry out the sentences. Ensign Kelly, commanding detachment 1st West Indian regiment, will parade in front of Court-House. Lieutenant Jones, commanding detachment Royal Artillery, will be pleased to see that the prisoners now in jail are present when the execution takes place." Thus it was in Gordon's case, *vide ante*.

(*b*) Captain Ford's evidence:—"Witnessed acts of clemency on the parts of General Nelson, Captains Hole and Adcock. As instances of their leaning towards mercy, Brigadier General Nelson, on the arrival of a party of prisoners from Bath, sent for me, and told me to look over, and see if there were any of my people among them, meaning, as I understood, that I might exonerate them, as not having been present at the rebellion. I saw him express the greatest annoyance that a man had been led to execution, and who would have been hanged, but for his prompt energy in having him removed from the gallows, on being told that the man had saved the lives of some overseers, although convicted of other acts of rebellion." Other witnesses gave similar evidence. So it was proved that Captain Hobbs had said, at the time, that he "was performing a very painful duty," and that he had, in the opinion of those present, shown a sincere desire, and taken reasonable means, *under the circumstances*, to get at the truth.

There was this advantage, indeed, in taking evidence of particular cases, that sometimes a single case (*a*) would be illustrative of the whole character of the rebellion, and its circumstances might go far to explain and excuse the severities which had been inflicted, even some of them which were contrary to the orders of the General in command, and most of the officers.

The practical course and result of the enquiry was this, evidence was given that numbers of negroes (*b*) had been

(*a*) Thus, in the case of Mitchell, who was executed, a witness stated that he had heard people on the estate say, that they would soon have the land for nothing, and not pay any rent; this was said when he was out dunning for rent, about two months before the rebellion; and "Mitchell was pointing out the things about the place, which, he said, would be belonging to black people; there were some other black persons about the yard; Saw Mitchell next morning with a cutlass in his hand; he came up to witness, raised the cutlass, and said, "by God, I have a great mind to chop your head off," and he struck his cutlass in a bale of bamboo, and after another man came out and remonstrated with him, he left me." What this man said, it was manifest, only expressed what was in the minds of the hundreds who went about, crying "Colour for Colour," and "Kill the whites, that we may have their places." (See the evidence of Hire, Burke, Shortridge, and a hundred other witnesses.) The witness then corroborated the evidence of Duffus, who stated, that Mitchell threatened his life, for which he was executed. (Evidence of De Pass.) Thus, also, a witness stated, that he went to Morant Bay on the Monday before the war; was also there on the Wednesday, and as he got there *saw two women with a person's tongue on a pole: they cried, "this tongue won't tell any more lies again to heaven or hell."* One was a black woman, and the other a brown woman." This may explain, and perhaps might seem to excuse, the fact that some of the women were flogged, though against the orders of the General and the principal officers.

(*b*) The friends and relations of those who had been executed, came forward and swore that their friends or relations had been shot or hanged, as the case might be; and this, of course, was easy enough; and, even if the witnesses *knew* the cause, the charge, or the evidence, which they might *not* know, they would not be likely to state it very fairly or fully—if at all. See, for instance, the evidence of Cecilia Stewart, who says she saw a friend of her's shot. "They said he was one of the rebels;" this she admits; and it is fair to presume that those who shot him thought so; but, unless legal evidence could be given of the cause, that case would stand as one of wilful and needless homicide. It was not always, perhaps, that witnesses were forthcoming to prove the cause. Thus, one Dacre stated, truly enough, that he saw 13 men shot under the orders of one of the officers, who, he adds,

shot, hanged, or flogged, and, of course, it was represented that it was without cause, and the officers in command of the detachments in the district were then called upon, by strict legal proof, to substantiate a sufficient cause in each case. But as the number was necessarily great, as the matters took place in haste, as it was never obligatory, and often practically impossible to keep notes or records, and as memory in individual cases might easily fail, and as, moreover, strict legal proof, which is not necessary under martial law, might not be forthcoming, the officers were put in a position of great difficulty.

Thus it was that particular cases (*a*) might, at first sight, appear to be ruthless murders, committed by the Provost Marshal, or on the order of some military officer, and it was a mere fortunate accident, perhaps, on which it might depend, whether the officer thus implicated could be able to produce witnesses to give evidence of sufficient cause for the execution. The result of such enquiries, of course, could not be otherwise than to elicit many false

said at the time he had a most painful duty to perform; but fortunately the witness was forthcoming on whose testimony they were executed; and she was confirmed; the case being that they had formed part of a band of blacks who went to a house in search of the white owner, evidently with a view to murder him. But if that witness had *not* been forthcoming? Prisoners were brought from gaols to swear they were innocent, and that the witnesses had stated falsely. What was such evidence worth?

(*a*) As in the case (which made a great sensation) of a man named Marshall, which may be mentioned as typical of a class. Several negroes swore that the man having first been flogged by order of the Provost Marshal (and as this was not impeached, it is to be presumed it was right), he was ordered to be hanged, merely because he ground his teeth. Now it happened that several British seamen were present, and it fortunately happened that they had not left the island when the Commission sat, and they swore that the man distinctly threatened the life of the Provost Marshal. This, under martial law, was about as formidable an offence as could be committed, and beyond all doubt would be capital; the execution, therefore, was fully justifiable as a matter of law. But it depended on the chance of those seamen being in the island, whether the Provost Marshal would be able to make out his justification, for his own oath, as being interested, might not have been deemed sufficient against the oaths of several others.

charges which it was difficult to meet, and thus to put officers, who had acted honestly, in great jeopardy.

That the officers were not reckless in these summary enquiries, was shown by this, that they appeared (*a*) to have distinguished carefully between cases of the mere possession of plunder, and cases in which other circumstances showed an active participation in the insurrection, especially in acts of murder, or attempts at murder, and, in general it appeared to be only in the latter class of cases the capital penalty was inflicted. And when driven to act upon positive testimony, they did not rely upon it without enquiries as to its credibility (*b*).

So far as the General or officers were concerned, for the most part, they deemed it their duty, to the utmost, to restrain the infliction of summary severities, as with regard to the burning of houses, or huts, in the disturbed district (*c*).

(*a*) Evidence of Lieutenant Adcock. "Prisoners were brought in. I investigated their cases, and the evidence of constables and other persons shewed that they had been engaged in acts of plunder; flogged some of them; one man, whose name I don't remember, was charged with having fired upon the volunteers at Morant Bay on the 11th; assembled a board of officers, who took evidence on the matter, and sentenced him to death—witnesses were not sworn, as I had no Bible—two magistrates told me that the word of the constables could be relied on; he was ordered to be executed; he was shot by the planters under Captain Ford." So it appeared, even in the letter (*vide ante* p. 242) of the volunteer officer, Captain Ford, which had been much commented upon, that the mere possession of plunder was never punished capitally; and that so far as the officers were concerned, men were never executed, but for active complicity in the rebellion.

(*b*) *Vide supra.*

(*c*) The General in command disapproved of it, except under great restrictions, and desired to confine it to the basis of those who were known to have been actively concerned in the rebellion, and the officers in command of detachments appear to have confined it to cases of houses belonging to rebels, in which plunder was found. The memorandum of the Commander-in-Chief to the Brigadier-General, was express on this point. The Major-General would like you to be careful about burning villages, and not to do so without it is clear the inhabitants have joined the insurgents." The case gives us no instructions, but leaves all to the judge. "That it is certainly not to be done unless it is clear the inhabitants have joined the

The General in command likewise exercised this control over summary executions, by means of strict restraints and regulations with reference to the Provost Marshal. Evidence was given by both the Provosts Marshal (*a*), at the two chief military stations in the district under martial law, as to their proceedings, whence it appeared that, as a rule, they awarded no punishment, unless authorized by the General in command, to do so, and executed no one except under sentence by court-martial. And they stated the number of prisoners they had dealt with, and how they were

rebels, and not necessarily to be done even then, but is to be a matter of judgment, and a measure of military necessity." And the Brigadier-General issued orders in a similar spirit, and never approved of wholesale burning of houses. "Care to be taken that firing of huts and buildings be not carried to excess." (Order to Lieutenant Adcock, October 20.) And reports of inferior officers, in command of detachments, generally mentioned that plunder was found in the houses which were burned. Colonel Fyfe, who commanded the Maroons, issued particular orders on this head, with special reference to the protection of women and children, upon whom, rather than on the men, even when rebels, the injury would fall.

(*a*) Thus, Major Prendeville, the Provost Marshal at Kingston, stated, that he did not inflict summary punishment until he received an order. Major Anson was the officer commanding at Camp; eight who were tried before court-martial were sentenced to death. Sentence was commuted on five and carried out on three—these were, Frederick Jones, Edward Denton, and Samuel Hargate. In that return you will find—Released, being innocent, 54; released, reprimanded and cautioned, 7; sent to Morant Bay, 15; sent to the Aboukir, 15; sentenced by court-martial, 8; commuted, 5; carried out, 3; sentenced to 50 lashes, inflicted, 5; sentenced to 100 lashes, 1; acquitted, 2; sentenced to 50 lashes, and pardoned, 1; sentenced to five years' penal servitude, 2; sent back to the Penitentiary, 1;—that was a man who was sent from the Penitentiary with no charge against him.—Deported, 10; remaining, and handed over to the authorities, 4. The charge against Jones was for using traitorous and threatening language in the Penitentiary: "If I had five of my countrymen, with a sword, I would kill Mr. Horton, and get all the black men to rise, like in St. Domingo." Denton was charged with murder—Sam Hargate, with having been taken with arms in his hands, in open hostility against the State. Those were the three who were executed. I was present at all the courts-martial—did not attend as a member, but as prosecutor. Evidence was taken in writing in every case, and all were preserved. The courts were conducted with all the necessary forms, as near as possible.

disposed of, whence it appeared that a large proportion were released or punished slightly

And though it was attempted to show that men had been punished recklessly several times for the same offence, it turned out that in such cases (*a*), the real truth was that the man had committed several distinct offences, for which, of course, under martial law, as under any other law, he was liable to be punished. Thus, mere plunder would be one charge, complicity in the rebellion another. So, threatening to murder or inciting to plunder, would be a distinct offence, capital under martial law.

That the General in command considered himself bound to exercise a control over summary executions, was manifest (*b*),. For, in fact, he did exercise this control, both

(*a*) Thus, the General admitted that a man, named Cowell, was sentenced to receive fifty lashes and released ; and was afterwards taken up and tried for murder on the 28th October. So it was also with a man named Mitchell. Thus also, in the evidence of the man (Lake), who, at the time of martial law, represented that it was being carried out properly; and, before the Commissioners, came forward to prove excess, stating that on one occasion, a man named Thos. Olgate was tried three times, first before the military court-martial, where he was sentenced to receive seventy-five lashes ; "before he got it, he was brought before the naval court-martial; during his trial he mentioned to the President that he had already been tried ; the President called upon the Provost-Marshal for an explanation ; the explanation was that he had *attempted to escape*. Two days after, he was placed before the military court-martial for the same offence, differently worded ; the first charge was for being with arms; for which he was sent to receive seventy-five lashes ; the second charge was the same as the first, and based on the representations of two persons, that if he was let loose, their lives would be endangered, and he was sentenced to be hanged. Mr. Gurney—I do not understand you. The Witness—The first charge was for being a rebel with arms, and the second charge was for threatening to kill some one. Mr. Gurney—These are two distinct charges, and I cannot see how the second charge was the same as the first, but differently worded." This is a specimen of the evidence given. The man had committed several separate offences.

(*b*) Various passages in the evidence disclosed this. For instance, the evidence of Lieut. Adcock disclosed that his instructions did not authorize him to execute prisoners, brought in by other detachments than his own ; the principle evidently being, that the officer was to be supposed to be personally cognizant of the cases of prisoners arrested by his own detachment,

with reference to officers in command of detachments, and likewise with reference to the Provost Marshal. And in was also shown by his directions (*a*), as to strict control by the officers over volunteers and civilians.

It is very remarkable (*a*) that, for the most part, if not entirely, any alleged instances of excess, or unnecessary cruelty, were either committed by civilians, or by younger officers, at the instigation of civilians, or by private soldiers (almost always black or native soldiers), without orders, and out of the sight and control of their commanding officers.

That the General in command was conscious that the responsibility devolved upon him of keeping as strict a control as possible, over summary infliction of punishments, especially *capital* executions, was manifest (*b*) from the

but would not be so of prisoners taken by other detachments. So, in several other passages.

(*a*) Thus, one of the younger officers said he had been induced, by one of the magistrates, to flog a few women. So Colonel Hobbs stated, that many of the summary executions he had ordered, had been upon the representations of the magistrates, and their strong assurances that he might rely on the witnesses. Thus also, one of the officers stated that he sent out a party on one occasion to ascertain cause of flames which he saw one night; he returned, and reported that a Mr. Bunting had caused some houses to be burnt; "saw Bunting next morning, and told him that he should report him to his Excellency the Governor, for doing what he did; he sent an apology, and asked me to take in consideration the losses he had sustained, and that he had had his house burnt, and I forgave him." All this showed the necessity for keeping the civilians under strict *military* control.

(*b*) Thus, General Nelson stated, "he never allowed men to be shot by order of magistrates," and see his letter as to the Provost Marshal (*ante* p. 205). (Evidence of Gen. Nelson.) "Heard that there were hundreds of prisoners in the gaol, and I sent my aide-de-camp there, to enquire into their cases, according to evidence furnished, to inflict corporal punishment if necessary, exercising his discretion, in order to have the prison cleared—would not allow Mr. Ramsay to order any person to receive 100 lashes."

"It was never brought to my notice that people were shot by order of magistrates; a little while after I returned from Morant Bay; his Excellency the Governor asked me if I had ever heard that a magistrate had ordered people to be flogged; I said, 'No, your Excellency, if I had, the chances are, that I would have flogged him."

"On the 23rd of October were tried four men and one woman; sen-

orders he issued either to restrain the Provost-Marshal or civilians from inflicting such punishments, except in certain classes of cases; and, as a general rule, capital executions were not authorized or allowed, except under orders of officers. And all barbarities or floggings of women he disapproved of.

It appeared (*a*) from the evidence of both the Provosts Marshal, that they were kept under close control of the General in command, and that a very large proportion of their prisoners were released, or subjected to minor punishments, and that it was only in a single case that a prisoner, who had threatened to take the life of the Provost Marshal, was hanged by his order.

In the only case (*b*) in which it was proved that the

tenced to receive fifty lashes; the proceedings were sent to me; approved and confirmed the sentences, except that on the woman, who I ordered to be released; I afterwards sent for the President of the court-martial, and I told him that it was no use his sentencing women to be flogged, for if he did, I would not confirm the proceedings; no woman was ever flogged with my knowledge or with my order." (*Vide ante* p. 137.)

(*a*) Evidence of Ramsey, Provost-Marshal at Morant Bay. He handed in a return of the number of his prisoners, and the manner in which they were disposed of; from which it appeared that 500 or 600 were released, and 177 hanged, of whom only one was hanged by his own orders; that was the case of a man named Marshall, who had threatened his life, an offence for which the General had repeatedly sanctioned the execution of men. (*Vide ante*, p. 345.) In one case, that of a man named Bailey, he was shot by the sentry, in attempting a second time, after warning, to escape. The Provost stated that General Nelson ordered courts to assemble at Morant Bay, and he obeyed the General's orders. General Jackson ordered one court to sit; sentences were not carried out on the prisoners tried by that court, because he thought General Nelson had command, and he waited till he came; four or five prisoners were sentenced to be hanged; of whom Bailey was one; and he sent them to the tent under the Provost Sergeant, with orders to keep them separate. General Nelson ordered him not to do anything till he had heard from him; six or seven soldiers were flogged for mutiny. He stated, that he had very few persons to guard the prisoners; his guard consisted of only seven men.

(*b*) This case was made a great deal of, and Ramsey was actually given into custody on a charge of murder. It was not anywhere stated that he was not justified in the flogging, and several witnesses, British seamen, who were on the spot, swore that Marshall threatened the Provost, as above

Provost Marshal had hanged a man without military order, or sentence of court-martial; it appeared, on the accounts given of the affair at the time, by eye-witnesses, and upon the weight of credible evidence before the Commissioners, that the man had threatened the officer's life; and as the General did not censure the execution, it may be assumed that it was warranted by military usage, under martial law, especially as it appeared that the General had censured this very officer for a comparatively trivial offence, in the way of excess in the discharge of the duties of his office, and had commended him, on the whole, for his conduct.

A good deal of evidence was taken as to the conduct of these important officers, the Provosts Marshal (*a*), and

stated; which clearly meant a threat of murder. (See the evidence of Penny, Plumbton, M'Closky, and Ramsey). There can be no doubt that, whatever may be said of the moral character of the act, it was strictly within the power of martial law. For a prisoner to threaten the life of the Provost Marshal, is a far more serious offence than mere seditious words, which, by martial law, are clearly capital. The seamen swore that, at Morant Bay, the man (Marshall), while the flogging was going on, said, "damn every white man, and God bless Bogle;" he said to Mr. Ramsey, "I will do for you"; "it was meant for Mr. Ramsey; he turned and nodded his head at him, and used the words." And one Lake, a coloured man, who was present, said at the time (see Levy's evidence), that he never saw a more determined expression of countenance, nor heard a more deliberate threat. Whether it was so or not, would depend upon the impression it produced on those who heard it. Assuming it to have been really deliberate, then it would clearly be an offence of a very formidable character, and punishable capitally. (*Vide* per Macdonald, C. B., in Wall's case.)

(*a*) As to the duties of these functionaries, see the letter of the General to one of them (*vide ante*, p. 205), in which, while rebuking him for some excess of zeal, and want of temper, he did justice to his general good conduct, and the trying nature of his duties. Many other witnesses gave similar testimony. For instance, Lieutenant Astwood stated, "I considered it necessary for the Provost Marshal to be strict under the circumstances." The following question was put by the Court: What was your opinion of the general conduct of the Provost Marshal at Morant Bay? Mr. Astwood: From what came under my observation at Morant Bay, I considered him to be an excellent and efficient officer; his position was a very trying one; the responsibilities of his office were very numerous, and I was under the

especially one of them, whose conduct was particularly impugned; and it appeared, on the testimony of the General in command, and other officers, that on the whole their conduct had been proper, considering the trying nature of their duties; and this was certainly the account given of it at the time.

It was brought out more than once, in the course of the evidence, that, under martial law, persons who commit any excesses, whether in carrying it out, or in acts of mere private outrage, are themselves liable to the summary penalties of martial law (*a*); and the General, on more than one occasion, denounced its penalties against those who should inflict unauthorized severities.

The Secretary of State (*b*), it will have been seen, had directed enquiries, particularly into the number of persons summarily executed, or punished *without* trial by court-martial; implying, plainly, in accordance with judicial opinions (*c*), that trials by court-martial, under

impression that they were faithfully performed; I did not see any cruelty towards the prisoners; sometimes saw the prisoners given a few lashes by a sailor, but never enquired into the cause; saw a prisoner struck on his shoulders, by a sailor, in the Provost Marshal's absence, and on his return called his attention to it, and he ordered it to be stopped." And it was very remarkable, and an illustration of the results of a fishing enquiry, that the principal witness against him, a coloured man named Lake, had, at the time, while events were fresh, given very different testimony. He admitted that he did say, in one of his despatches, that the Provost Marshal was the "right man in the right place."

(*a*) Thus, when asked if he had heard that a civilian had taken upon himself to order floggings, he said with emphasis that he had not, and that, if he had, he probably should have ordered him to be flogged. (Evidence of General Nelson.) So it appeared that he had issued an order that the officer in command of a detachment, should forbid any man to enter a house, unless accompanied by an officer, and that any man found doing so, should be handed over to the Provost Marshal for summary punishment. (Order of Oct. 25, to Lieutenant Adcock.) So, in a letter to the Provost Marshal, he told him that his peculiar province was to punish and repress such excesses or breaches of discipline. (*Vide ante*, p. 205.)

(*b*) *Vide ante*, p. 244.

(*c*) *Vide ante*, p. 80.

martial law, are proper measures of precaution, dictated by natural justice in all but the clearest cases. And this had evidently been the opinion of the General in command.

The necessity for the courts-martial depended entirely on the will of the General, from whom their authority emanated(*a*); whether or not there should be a court-martial, was a matter determinable entirely by him, or the officers acting under his directions, and subjected to his control. The general tenor of his orders, or of the measures taken under his sanction or example, was, that executions or summary punishment should be limited to cases of men taken red-handed or found in arms, or in active rebellion; and that, in cases not of that character, there should be courts-martial, and legal (*b*) as well as military authority would appear to support that view.

The Commissioners entered largely into the subject of the trials, and convictions by court-martial—especially the capital convictions and executions under sentence of such courts. This was, perhaps, the most important head of their enquiry (*c*), and it imposed questions as to the

(*a*) *Vide ante*, p. 172..

(*b*) *Vide Wall* v. *Macnamara*, *ante*, p. 80, in which it is laid down that, in case of mutiny or rebellion, it is proper to hold an enquiry which may be by drum-head court-martial. The necessity or propriety for it would be a question of circumstances. The General, in this case, had, it appeared intimated that an officer ought not to execute men summarily, who were sent in by other detachments than his own; as to the circumstances of whose capture he could not be so personally cognizant, as he might be supposed to be, in cases of men captured by the troops under his own command.

(*c*) For reasons amply explained in previous parts of this work, the common law finds ample legal powers for the resistance and suppression of actual insurrection, and the summary treatment of those engaged in actual outbreak. The great object and end of martial law is the suppression of a state of rebellion by means of deterrent measures, especially the summary trial and execution of the rebels taken prisoners, which requires some enquiry; and, unless they are taken red-handed, demands, as a measure of proper precaution, trial by court-martial. The authority of courts-martial, therefore, is the most important part of martial law,

authority or jurisdiction of such courts, and as to their proceedings.

As to the question of jurisdiction, no doubt the Mutiny Act and Articles of War apply primarily and properly only to military persons (*a*), although there is authority for saying that persons either paid or employed as military persons, in the service of the Crown, would come under their province. But it has already been seen (*b*), that, in time of war, the Crown acts by its prerogative (*c*), and that the Mutiny Act and Articles of War do not limit the prerogative abroad (*d*). And, by the prerogative, the Crown, or a Governor (*e*), can issue commissions, which will authorize courts-martial (*f*).

The question, therefore, as to authority to hold these courts-martial, or to the authority of the courts so held, would depend upon the general question, already amply discussed (*g*), as to the power of the Governor to declare martial law, and the effect of such declaration, in establishing a state of war, which would enable him to exercise the prerogative power of the Crown, and convey to the General in command the authority to hold such courts on non-

and it rests on the broad ground that martial law extends military law to all persons, including the authority of military courts-martial.

(*a*) *Grant* v. *Gould*, 2 H. Blackst. rep. 69.

(*b*) *Vide ante*, p. 3.

(*c*) *Barwise* v. *Keppel*, 2 Wils. rep. 314.

(*d*) *Rex* v. *Suddis*, 1 East. rep. 316.

(*e*) *Bradley* v. *Arthur*, 4 Barnwall and Cresswell rep. 301. "Looking into the Articles of War, it appears to be taken for granted that it is within the prerogative of the Crown, and that not only the Crown itself, but also, under certain circumstances, a Governor, may grant such commissions. In many cases it must be essentially necessary," &c. (*Per Curiam ibid*, p. 311). The cases of war or rebellion were not mentioned, but no doubt would come within the doctrine thus laid down.

(*f*) And, in point of fact, as already mentioned, (*vide ante*, p. 129), the Governor issued a commission to Colonel Nelson, as Brigadier-General, to give him field rank, and enable him to command the forces, and issue commissions to hold courts-martial.

(*g*) *Vide ante*, p. 80.

military persons. For if the declaration had that effect, and if the effect of declaring martial law was to apply military law to non-military persons, then, in point of fact, he did convey that authority to the General, and courts held under his warrants would be lawful, and would have as much power over non-military persons as military persons.

The first, and most important question, would relate to the source of the authority of such courts, which would be the supreme military authority of the district. And then there would be the question of jurisdiction in particular cases, or whether the cases were within the cognizance of the courts.

The General in command stated several important points (*a*), in regard to trial by court-martial under martial law (*b*); as it was not material for him to ascertain where the prisoner was apprehended, supposing there was evidence of an offence under martial law, *i.e.*, within the district, and within the cognizance of martial law, but that it was for him to decide whether the prisoner could be tried by court-martial, *i.e.*, whether the charge was within its jurisdiction, though it was for the court to say whether it was proved, and then for him to approve or disapprove the finding in the sentence (*c*).

(*a*) Thus, as to the case of Flemming, he said, it was not his duty to ascertain where the prisoner was apprehended, and he did not do so in Flemming's case; you had better ask that question of the officer who went out in charge of the party who apprehended him. He ordered him to be tried, *and it was the duty of the court to see whether he was guilty or not;* he approved of the sentence (Ev. of Gen. Nelson).

(*b*) *Vide ante*, p. 177.

(*c*) All these points had an important bearing on the case of Gordon, which will probably be long considered the leading case on the subject (*vide ante*, p. 176, *et vide post*). That was an exceptional case, raising questions of jurisdiction, which did not ordinarily arise, and therefore may be best considered separately. But, as regarded the question of time, it only raised the question, which was raised in most of the capital cases, as to jurisdiction over cases arising before the declaration of martial law, as to which, *vide ante*, p. 102.

There would first be the question of the authority to convene the court-martial, and then the question whether the case would be within its cognizance. And both questions, it appeared, were considered to be for the military Commander, who convened the court, and sent the prisoners for trial.

Those who had sat upon courts-martial (*a*) gave evidence as to the authority under which they had sat; and it appeared that they had sat under orders or warrants from the General in command, as the supreme military authority in the district in which, while martial law was established, the military authority prevailed.

Immediately upon the proclamation of martial law, courts-martial were held, the Attorney-General himself setting the example of sitting upon one of them (the first that was held), for the trial of those implicated in the massacre, at which several were convicted, and condemned to death. Yet this, of course, was for a crime committed before martial law, though after the state of war had commenced. And it never occurred to the Attorney-General that the courts-martial had no jurisdiction (*b*).

(*a*) Thus, Mr. Lewis, who had sat as president of a court-martial, exhibited to the Commissioners the warrant or order he had received from General Nelson, authorizing him to sit. And he stated that he had adjourned at the General's direction, the Provost Marshal being required to attend another court. He at first was not told to take any notes, but he did take some rough notes for his own guidance. Before he got leave of absence he was asked for those notes, and he gave them. He sat on all the courts-martial held at Port Antonio. The Brigadier-General had all his notes. He could, on reference to those notes, give the result of each case, the name, charge, and sentence of prisoner. So Mr. Astwood, who also had sat, stated that he sat under the authority of the officer in command, and under a warrant from the Commander in the district. He read the form in the Mutiny Act. Upon which the Recorder observed that the Mutiny Act did not apply to martial law, which is true, as the works on court-martial point out, as the Act only applies to *military* persons.

(*b*) The Attorney-General said:—"My colleagues were Mr. Fyfe, who held the rank as Colonel of militia, stipendiary magistrate, and member of the Legislative Council; Mr. Andrew Lewis, a Colonel of militia, and formerly an Adjutant-General; Mr. P. A. Espeut, proprietor of an

As regarded the proceedings before the courts-martial, it is to be borne in mind, that the scope of the enquiry was rather moral than legal (*a*). It was probably, in this point of view, the Commissioners entered so largely, not only into the proceedings at the trials by court-martial, but also the merits, that is, the guilt or innocence of the parties, which, it is manifest, in any other view, would be entirely irrelevant (*b*). If lawfully tried and fairly tried, that would

estate in the parish, and of several others; with Captain Hunt of the marines, and Colonel of militia, as president." The Attorney-General then went on to state the nature of the proceedings before the courts, and the way in which they were conducted. "We were all sworn, I believe, on the exact oath administered to the courts in the army; I took no memorandum of the number of persons who were tried, I think seven or ten; I think four or five were condemned to be hanged, one was a woman; they were all tried in reference to the actual outrages and murders perpetrated a few days before; they were proven as the guilty participators and actual actors, on the 11th October, on that little square, the Parade; this was proven the same as if they were before one of the ordinary courts of justice. Most assuredly the woman was the worst of the lot; she was recommended to mercy. Speaking for myself, I may state that I concurred in the recommendation, that the sentence should not fully be carried out on her, solely from policy, and not because I did not think she was a murderess. The people had abstained hitherto from violence to women, and I thought it was desirable not to provoke them to it, to prevent brutality and cruelty in their future movements towards females, as I was aware that they had gone up to ladies' houses." It will be observed that it never occurred to the Attorney-General, as admitting of doubt, that the courts-martial could take cognizance of crimes committed before the proclamation of martial law. (*Vide ante*, p. 210.)

(*a*) *Vide ante*, p. 325.

(*b*) A man who has been convicted cannot disturb the verdict or finding, on the ground that it is against the evidence; neither can he do so, even by convicting the witnesses of perjury; but that will be a good ground for applying to the Crown for a reversal of the *sentence*, though the *judgment* may remain; for the *judgment* was all right on the facts, as they appeared in evidence, and the sentence is remitted on moral, not legal grounds, as was witnessed in a recent remarkable case. So, in the cases in question, notwithstanding that the proceedings of the court-martial were all perfectly lawful, and proper, and fair, yet, if on the real facts the Crown thought that the parties convicted had suffered unjustly or excessively; the sentences might be remitted; and in cases of persons sentenced to penal servitude, this was done.

suffice for legal justification; but, supposing, on the other hand, everything legal and proper, or, on the other hand, supposing any illegality or departure from what was fair and proper, it would be material to consider, in a *moral* point of view, what were the merits, and whether there had been any failure of substantial justice.

The Commissioners entered at great length into an examination of the proceedings on trials by courts-martial (*a*), with reference, it is presumed, not to their legality (for, assuming a lawful declaration of martial law, and a lawful warrant, order, or authority from the General in command convening the courts, that, it is conceived, would be unquestionable), but with a view to see if their proceedings had been fair, and according to natural justice. For, if it had meant more than that, it is conceived that it would have implied an erroneous view of law, as regards the result of declaring martial law, which, according to the authorities already amply appealed to (*b*), is, to make the

(*a*) It is true that Mr. Gurney, in the course of the examination of one of the officers who had sat on courts-martial, Mr. Astwood, who stated that he had sat under warrants or orders from the General in command "under the Mutiny Act," (*vide* the evidence of Gen. Nelson, Mr. Lewis, and Mr. Heslop, the Attorney-General, Mr. Espeut, and others), said, "that it was well known that courts-martial, under martial law, had no authority, the Mutiny Act not having any application to such cases." But that must mean that such courts did not derive their authority from the Mutiny Act, which is quite true. In time of war, the Crown acts by its prerogative, not under Mutiny Acts, which are only required in time of peace (*vide Barwise* v. *Keppel*, 2 Wils. rep.). And in time of war, or invasion, or rebellion, the Crown, by its military Commanders, does all, as regards military or non-military persons, which, in time of peace, it can do by ordinary military law, as against military persons (*vide* Simmons on Court-Martial). The effect of martial law is to make lawful, as against *all* persons, what in time of peace is only lawful in regard to soldiers (*et vide ante*, p. 45).

(*b*) *Vide ante* p. 180. "Martial law is a '*Lex non Scripta*,' it arises on a paramount necessity to be judged of by the Executive. Martial law comprises all persons. All are under it in the country or district in which it is proclaimed, whether they be civil or military. There is no regular practice laid down in any work on military law, as to how courts-martial are to be conducted, or power exercised under martial law; but, as a rule, I should say that

military authority, which, in time of peace, is only applicable to military persons, applicable, as it is in time of war, to *all* persons, and to require nothing more than the observance of the dictates of natural justice and humanity.

The proceedings of courts-martial, whether with reference to proceedings or sentence, can only be reviewed by the General, and the Commander-in-Chief, or the Crown (*a*), and not in a court of law. And when there is—as there is in war or rebellion—a discretionary power by the prerogative independently of court-martial, so that the act done under the sentence of the court might have been done by the Crown or the General *without* such a trial, then the holding the trial itself is an act of discretionary authority(*b*).

When a court-martial, or any other lawful tribunal, however irregular or inferior, has sat and determined on a matter within his jurisdiction, there is no such thing as a

it should approximate as near as possible to the regular forms and course of justice, and the usage of the service, and that it should be conducted with as much humanity as the occasion may allow, according to the conscience and the good judgment of those entrusted with its execution. (*Vide* Ev. of Sir D. Dundas, Judge-Advocate-General, before the Ceylon committee, 1849-50.) This quite corresponds with what is laid down in Simmons and M'Arthur on Courts-Martial, that the custom of the army is followed where there is no fixed or definite rule. So it agrees with what Lord Loughborough says in *Grant* v. *Gould*, 2 H. Blackstone's rep. 68, "that courts-martial are not bound by the rules of evidence as courts of law are." It would be extremely absurd to require the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace. (Lord Loughborough, C. J., in *Grant* v. *Gould*, 2 H. Blackst. rep. 68.) So it agrees with what Macdonald, C.B., said in Governor Wall's case, as to drumhead courts-martial (*vide ante*). Courts-martial are mentioned by Bentham as courts of natural procedure, for the very reason that they are not fettered by any particular rules. (See Bentham's Rationale of Judicial Evidence.)

(*a*) For this reason it is that military courts-martial remain in existence till dissolved by the same authority by which they are held. (1 M'Arthur on Courts-Martial, p. 262.)

(*b*) *Ex parte Poe*, 5 B. & Ald. 638. For what the Crown (or the General) had power to do independently of any enquiry, he may do, although the enquiry should not be satisfactory to a court of law; or even though the court which had conducted it had no legal jurisdiction to enquire. *Ibid.*

court of error upon its judgment or sentence (*a*), and there can be no reviewal of its proceedings, unless there is some appellant authority provided by statute or usage, as in a certain sense there is in the case of court-martial, by the power of the General to review, and confirm or set aside the proceedings (*b*). And it has always been recognized that such courts may pass sentences which the law of England would not warrant upon similar charges (*c*).

As regards the proceedings of the courts-martial, assuming their jurisdiction, it has already been shown (*d*) that they are inferior irregular courts, not proceeding by the course of the common law, nor bound by its rules of evidence; and that the sole question would be, whether they observed the rules of natural justice; that is, had some evidence on which

(*a*) Thus, in the case of a court-martial, the Court said, "We are not sitting in a court of error, to review the regularity of their proceedings; *nor are we to hunt after possible objections.* It is enough that we find a sentence pronounced by a court of competent jurisdiction to enquire into the offence, and with power to inflict such a punishment." (*R.* v. *Suddis*, 1 East. 317).

(*b*) By the rules of the service, the proceedings of a court-martial are always subject to the review of the General in command, who, if he saw that there was no evidence which would sustain the charge, or no charge that could sustain the sentence, would be bound to refuse to confirm the proceedings. (See General Nelson's letter *post*, p. 394).

(*c*) The court-martial was not bound to pass such a sentence as the law of England would warrant upon a similar charge. (*R.* v. *Suddis*, 1 East. 317.) Yet that was in time of peace; and the sentence, which was one of a long term of penal servitude, was one which would not have been warranted by the law of England, in such a case.

(*d*) *Vide ante*, p. 80. In *Rex* v. *Suddis*, East. rep. 316, a case of a court-martial abroad—which, by the Articles of War, had that discretionary power which, in time of war or rebellion, courts-martial have; it was said by the court, that the proceedings and the judgment were not governed by the law of England; and that, as the court-martial had jurisdiction, it was enough, if the substance of the matter, or the *corpus delicti*, sufficiently appeared, to enable them to get at the truth and justice of the case. The natural leaning of the courts of common law, it was said, was in favour of prisoners and judges, and gave way too easily to formal objections on the part of the prisoners; but judges, in our foreign possessions abroad, were not necessarily bound by the rules of proceedings in our courts here.

they might honestly, however erroneously, proceed, and gave the prisoners an opportunity of making their defence.

Moreover, even in the courts of common law (*a*), although the courts will adhere to and enforce their particular rules and positive rules of evidence, practice, or procedure in the *course* of the trial, they will not disturb a finding in a criminal case (*b*), even although it is capital, on account of a departure from those rules, and the verdict is final; and, as a matter of law, even if it is against the prisoner, no new trial can be had. And, further, even in a civil case (*c*), in which a new trial may be had, the courts will not grant it on any such ground, unless they can see that there has been a verdict contrary to law, or that *substantial injustice* has been done.

It is well established (*d*), that even in judicial proceedings,

(*a*) In a criminal case, there can be no bill of exceptions, and no writ of error, without the *fiat* of the Crown, and no new trial (in felony), and no appeal upon the facts, and only on the law with leave of the Judge. And if the jury convict, as the author has often known a jury do, without sufficient evidence (provided there is any), and in defiance of the advice of the Judge, there is, legally, no remedy, for the weight of the evidence is entirely for them. Nay, further, though a rule of practice requires that an accomplice should be confirmed, if they choose to convict upon it, without *any* confirmation, their verdict cannot, in law, be disturbed.

(*b*) As the admission of evidence, not receivable, in law.

(*c*) Thus, as the absence of witnesses and refusal of adjournment (*Hoare* v. *Silverlock*, 19 L. J., C. P., 215), or the plaintiff obtaining a verdict, without calling a witness, whom he ought to have called (*Honeyman* v. *Lewis*, 23 L. J., Ex. 204), or allowing the wrong party to begin and reply (*Brunford* v. *Freeman*, 5 Exch. rep., 334. *Butler* v. *Brayne*, 5 C. B. 155). And so in numerous other instances. (See notes to *Dickson* v. *Peel*, 3 Fin. rep).

(*d*) Thus, per Holt, C. J., said, " of common right, the party ought to be summoned, if possible, that he may have an opportunity of making his defence, and it is abominable to convict a man behind his back (*Q.* v. *Dyer*, 6 Mod. rep. 41). It is against the law of England, that a man should be condemned, without notice to make his defence (*King* v. *Gregg*, 8 Mod. rep. 3). And it is *contrary to natural justice*, that a man should be degraded without being heard (*King* v. *Chancellor of Cambridge University*, 2 Lord Raym. rep. 1334). (So *per* De Grey, C. J., *Fisher* v. *Lane*, 3 Wils. 247). This is *all* that has ever been held necessary in such cases. And it has been often held, on the other hand, that such inferior courts are not bound by rules of evidence which bind superior courts (Tindal, C.J., *Douglas* v.

in courts not bound by the rules of the common law, all that is necessary to satisfy natural justice, is a fair hearing and opportunity of defence; and it is, no doubt, contrary to every principle of justice, that a *judgment* should be pronounced, without giving the party an opportunity of adducing evidence (*a*). But, in the exercise of an irregular power, like that of martial law, nothing more than natural justice is obligatory in point of law; and natural justice has never been held to involve *more* than a fair hearing (*b*).

The enquiry, therefore, into these trials by courts-martial did not relate merely to the *legality* of their proceedings, but rather had a much wider scope,—their fairness and propriety. With regard to the cases of those who had been tried by court-martial, the Royal Commissioners entered, not merely into the question, whether they had been fairly tried according to military usage and natural justice (*c*), but into the question, whether they were guilty or not, and whether they were guilty of offences which, at common law, would justify the penalty, which would have been wholly irrelevant to an enquiry as to legality.

Assuming the absence of lawful authority in the courts-martial, every single act done was illegal, and every execution a murder. Assuming their lawful authority, then, of course, sentences of imprisonment or penal servitude would

Forest, 4 Bing). All this has been expressly applied to proceedings before courts-martial. It would be extremely absurd to expect the same precision in a charge before a court-martial as in a conviction before a magistrate (Per Lord Loughborough, C. J., *Grant* v. *Gould*, 2 Hen. Blackstone's rep. 68). And they are not bound by the rules of evidence, which prevail in the common law courts (*Ibid et vide*, *Rex* v. *Suddis*, 1 East. rep. 327). The rules of natural justice bind *all* tribunals, and a man must never be condemned without evidence, or unheard.

(*a*) Per Lord Lyndhurst, C. B., *Capel* v. *Child*, 2 Cro. & Jer. rep. 550.

(*b*) *R.* v. *Smith*, 5 Q. B. rep. 614. In that case the doctrine of natural justice was carried to its extreme extent, in holding that a man ought to be heard in explanation, even of what is matter of eyesight. No doubt, that would be the better and safer course in serious cases (See the Author's notes to *Dickson* v. *Peel*, 3 Fin. rep. 553).

(*c*) By which, of course, *all* courts are bound, but courts-martial are only bound by these rules, and by no other, and mere formal rules.

be as legal as the infliction of floggings or of death, for the power to inflict the larger punishment would involve ths power of imposing the *lesser* one; and it has been held (*a*), that such sentences may be inflicted by courts-martial, if they have lawful authority and jurisdiction. Accordingly, many of the prisoners (*b*) were so sentenced to terms of penal servitude or imprisonment.

Prisoners (*c*) thus sentenced were brought from prisons and penitentiaries to swear that they were innocent, and that the witnesses who had given evidence against them had given false testimony; but even they admitted that they had been *tried*; that witnesses *had* given evidence against them, and that they knew what was stated against them, and were heard in their defence; and it is conceived that this is all that could be material in such an enquiry.

(*a*) *Rex* v. *Suddis*, 1 East rep. 318. There a prisoner was sentenced to transportation for fourteen years, and in a case in which, at common law, no such sentence could have been inflicted. And the court said that, as the court-martial had *jurisdiction*, and a discretionary power of punishment, it was enough.

(*b*) Upwards of a hundred, all of whom, however, were afterwards liberated, through, it was said, a notion on the part of the Colonial authorities, that when martial law ceased, the *validity of their sentences* ceased. But this would be such an obvious error that the step must have been taken on some other ground. (*Vide post*).

(*c*) Take, for instance, the case of Thomas Williams, brought over from the General Penitentiary, under a writ of *habeas corpus*. He said he was made prisoner and tried before court-martial. He had evidently set up that he was forced to join the rebels, for he stated that the court said, "when you saw those rebellious people, why did you not look for a gentleman." He said "Mrs. Paterson said that she knew me and saw me among those looking for her husband, and that I could not have been looking for him for anything good"—but he said he never went to the house, nor had anything to do with it—though he admitted he was not working; the court-martial, after he was tried, sent him to the penitentiary for seven years. The man said he was not tried fairly, but suppose all the prisoners who have been convicted before the two learned Recorders were examined as to their respective trials, they would most likely declare the witnesses false—the judges partial, and the jurors prejudiced. What was the worth of such evidence, especially when the witnesses examined before the court-martial repeated their evidence, it is not material to consider.

To the question of legality, it need hardly be observed, the guilt or innocence of the parties executed or punished would be irrelevant. No matter how clear their guilt, if the courts had no lawful authority, their trials were utterly illegal. On the other hand (*a*), although they were innocent, if the courts had lawful authority, at all events if their trials were fair (*b*), their convictions would be perfectly *legal*.

Nor would the innocence of the persons convicted be, necessarily, any element in the consideration even of the *propriety* of the trials, for it is manifest that the trials might be perfectly fair and proper, although the verdicts *turned out* in the result to be wrong, or even *were wrong at the time*, in the opinion of others (*c*). Evidence may be erroneous, or the judgment formed upon it may be erroneous, although the trial is perfectly legal, and perfectly proper and fair. The criterion as to the *propriety* or fairness of the trials would be, the *evidence* as it appeared on their trials.

And, further: in considering the evidence on such trials, a distinction must be drawn between its admissibility and its

(*a*) The innocence of parties convicted, even if afterwards clearly proved, would not necessarily show any impropriety, even in the trials; cases have occurred in which it has been proved that persons, tried before able and experienced Judges, turned out to be innocent.

(*b*) It is not, perhaps, clear, how far the want of fairness in the *trials*, assuming lawful *authority* in the *courts*, would render the trials unlawful, or invalidate the sentences. An *utter* want of hearing would probably have that effect. But there might be some amount of unfairness caused by the belief in the prisoners' guilt, which, if the evidence made it clear, would not invalidate the verdict, however censurable it might be. And here, again, there would be scope for the enquiries of the Commissioners, if not as to legality, as to propriety.

(*c*) As already observed (*vide ante*, p. 194), there is nothing on which men differ so much as to the effect of evidence, especially when it is circumstantial, or presumptive, or depends on probabilities, for these are necessarily matters of opinion. And so, as to the *credibility* of *positive* testimony, it is always, more or less, a matter of opinion. And *opinion* is always, more or less, arbitrary and uncertain, and depends on individuality, having necessarily to do with their mental character or power.

sufficiency; and as to its sufficiency, a distinction must be drawn between its credibility and its effect. For the purpose of judging of the sufficiency of the evidence—as courts-martial under martial law are not bound by legal rules of evidence (*a*)—all the evidence must be assumed to have been admissible. And any objections to any part of it can only be considered as going to its credibility or weight, which would depend on circumstances, and the effect of the *rest* of the evidence(*b*). That, it would necessarily be for the court to consider, and, in judging of their finding, or the sufficiency of the evidence as a whole, it must be assumed not only that it was all *admissible*, but that it was all, or *may* have been, in their opinion, *credible*.

Legally, of course, the *only* question—and, morally, the *great* question—was whether the trials were *fair*. So far as appeared (*c*), on the evidence of either civil or military

(*a*) *Vide ante*, p. 80.

(*b*) For that might be strictly and legally admissible, and might so *confirm* the questionable evidence as to outweigh any objections to its admissibility or its credibility; and, on the other hand, the questionable evidence might *confirm* the strictly *legal* evidence, which, in itself, might in strict law be sufficient to sustain the verdict.

(*c*) Evidence of Colonel Hunt, who accompanied the Governor to Morant Bay, and went to Port Morant—"A trial, you may call it a court-martial, was held—I was the President—two members of militia were members—Flemming, a boy, and three or four others were tried; Flemming was sentenced to death, the boy to receive fifty lashes, and the rest were let go. I first swore in the members, and after that the senior member administered the oath to me: witnesses were sworn, and we took notes on the back of a bill, the only bit of paper we could get; four or five witnesses gave evidence. When I got to Morant Bay, I sat on another court-martial; Mr. Heslop, militia, and Mr. Espeut, militia, with Colonel Lewis, militia, as members; three men were sentenced to death, one to be flogged, and a woman to death, with a recommendation to commute the sentence to transportation for life; the sentences were carried out on all. We then went back to Port Antonio to see the refugees; at Port Antonio, sat on another court—the members were sworn in the same manner, and evidence taken; the Attorney-General was present as a spectator, and assisted me in compiling the questions to be asked; 27 were sentenced, and the proceedings handed to the General; after that we returned to Monckland." I saw punishment inflicted on the rebels, according to the evidence against them; *no one was punished*

persons who were present or assisted at courts-martial (at some of which the Attorney-General was present), speaking generally, the proceedings were reasonably fair, and the prisoners had fair trials; the best evidence that could be had on the spot being taken, and the prisoners heard in defence, and no reasonable application for enquiry refused.

So much attention was given to the question, that it was manifest the Commissioners deemed it, in every point of view, the main consideration. It appeared (*a*), from the evidence,

before being tried." So the Hon. Mr. Espeut stated:—"Different courts-martial were held after we landed. There was one held the same day we landed; four or five persons were tried. Colonel Hunt was present; notes were taken of the proceedings. The courts were, in my opinion, fairly conducted; opportunities were offered to the prisoners to prepare their defence. No application was ever made to any of the courts-martial I was on to afford time; if they asked us to allow them to examine a witness, and that witness was not present, we remanded them. We remanded many. Some were tried singly and some in batches. We sat at Port Antonio for seven days, and went to Morant Bay and sat till 6th November." So George Ffrench, stated:—"I am clerk of the vestry and collector of dues in Portland—I presided over courts-martial held in Portland in the months of October and November last; the records were forwarded to the General; sat by direction of Captain Luke and Captain Hole. All those who were tried, flogged, or executed, were tried by court-martial, and evidence taken against them; minor cases were handed over to the Provost Marshal by Captain Hole, and the Provost Marshal took evidence against the prisoners; they were cases of larceny; but actual plunderers, murderers, and cases of arson were tried by court-martial.

(*a*) Evidence of Mr. Warmington:—"Saw an immense quantity of prisoners brought over; they were identified by constables; they were first examined by Captain Hole, and sent for trial at the court-martial. Those who were not proper subjects for court-martial he disposed of himself; they were flogged. Very few were disposed of by him. About thirty or forty were flogged, received from fifty to a hundred lashes. The court-martial sat at Muirton; thirty-three were executed up to the 5th of November. Not one was executed without being first tried by court-martial. Captain Hole took the greatest pains in sifting the evidence before he sent them for trial. Held a commission as Lieutenant of volunteers. Sat as President of the court-martial, associated with Ensign Cullen of the 1st W. I. regiment, and Ensign Lewis of the 6th Regiment." Evidence of Mr. Ford:—"Captain Hole, to whom I sent prisoners for trial by court-martial, wrote to me more than once, for further evidence, saying he would not execute any man on

not only of the officers, but of civilians, that the officers who sat upon or directed courts-martial, took the utmost care to secure a fair and proper trial in every capital case; and that, as a general rule, except prisoners taken in arms or red-handed, none were executed without trial by court-martial.

In two cases (*a*), which, from their close connection with the character and nature of the disturbances, or the very outbreak of a premeditated rebellion, and a conspiracy for a massacre, and also as typical and remarkable cases, were deemed of greatest importance, the evidence taken before the courts-martial was gone into again at great length, and with the utmost care.

The Commissioners entered particularly into the case of Gordon, the person who had been, by order of the Governor, arrested in the place excepted out of the declared district, and sent into it (*b*), with a view to his trial, if there

one witness's statement. Captain Adcock, who was my immediate Commander, gave a very resolute and definite caution to the volunteers, that he would not permit or overlook it, if any previous disagreements or prejudices were allowed to influence the testimony against witnesses, whom, he said, he should deal with solely for acts during the rebellion."

(*a*) These were the cases of Gordon, and of his agent Lawrence. The latter was first tried, convicted, and executed for complicity in the massacre, the main evidence being that of a Mrs. Major and her servant, to the effect that, on the day of the massacre, and some hours before it, and at a distance, he used expressions which showed a knowledge that it was to take place. These witnesses were examined before the Commissioners.

(*b*) Evidence of Governor Eyre:—Mr. Eyre said it was by his direction that Gordon was apprehended in Kingston, whither he had fled. Gordon, it was true, surrendered; but not before it had become matter of positive certainty that the police were close upon him, and must soon discover his hiding-place. Previous attempts had been made to arrest him at his own residence, which was situated within the proclaimed district. Mr. Gurney asked the witness what was the information which led him to believe that it was of importance to apprehend Gordon, whether in the disturbed district, or out of it. Mr. Eyre said that, when in that district he had heard, from many quarters, a great number and variety of facts, which led him to believe that Gordon had been in communication with the chief rebels, and was, indeed, the prime instigator of the outbreak. The same opinion was universal at Kingston. "Amongst other things, I was informed that some of

should, in the opinion of the General in command, be sufficient evidence to warrant it. For that arrest and removal, no doubt, he was responsible, and they conducted his examination, evidently with a view to the propriety of the measure, and not merely with reference to its legality, as to which, indeed, many of the topics they entered into would be irrelevant.

So far as regarded the propriety of the arrest and removal of Gordon, with a *view* to his trial by court-martial, which was an act for which the Governor would be morally, though not legally responsible, it is manifest that, had there been any ground for supposing that justice would not be impartially administered in the island, and that a conviction, even on sufficient evidence, would not have been obtained (*a*), in such a case, it would have been a good reason for sending the prisoner for trial before a court-martial (assuming that his punishment was deemed necessary); and if the delay which would be caused, even by a special commission of oyer and terminer, to try the case, would have prevented the deterrent effect deemed essential, it would have been an additional reason for taking the other course. And on both points evidence was taken by the Commissioners.

the rebels had declared Gordon to have been the cause of their coming to the gallows." (*Vide* Evidence of Espeut and others, *vide* also the Evidence of Colonel Hobbs and Colonel Nelson, who had heard it from prisoners who were executed.)

(*a*) Evidence was given that the jury system was such, the great body of the jurymen being coloured persons, that it was impossible to obtain fair trials of persons belonging to that class; that the juries went into the box resolved to acquit the accused, whatever might be the evidence. (Ev. of Walcott and Williams.) This being so, of course it would have been perfectly idle to put upon his trial a popular coloured person, for an offence like sedition, or seditious conspiracy, which is precisely that in which there is most difficulty in obtaining a conviction, from the legal difficulties which surround the subject, and in which, therefore, the least degree of bias in favour of the Crown would ensure an acquittal. If the Governor and his Council really believed that Gordon was legally guilty, and his conviction necessary for the entire suppression of the rebellion, this was a most material consideration.

In a legal point of view, it is manifest that, in this or in every other case (*a*), the putting the prisoner upon his trial was entirely the act of the General in command (*b*), as also was the framing of the charges, the examination of the evidence, and the approval of the proceedings, and the trial, and the sentence, which he, as military Commander, had approved, and submitted, *not* to the Governor, but to the Commander-in-Chief.

So, in his evidence (*c*) before the Commissioners, the General assumed the entire responsibility of putting the prisoner upon his trial, stating that the Governor had submitted to *him* the question, whether there was sufficient evidence to have him tried, that is, whether the evidence would sustain any charge within the cognizance of a court-martial, and it was he who decided that there *was*; who proved the charges, convened the court, conducted its proceedings, and approved its sentence.

It could only, therefore, have been with reference to the

(*a*) *Vide ante*, p. 190.

(*b*) He so stated, in his letter to General O'Connor:—"Sir,—After six hours' search into the documents connected with the case of G. W. Gordon, I found that I had *sufficient evidence to warrant my directing his trial. I prepared a draft charge and précis of evidence* for the court. The president having transmitted them, I carefully perused them. The sentence was death. I considered it my duty fully to approve and confirm. I enclose the whole of the proceedings of the court for your information, as you may desire to see what evidence led to the conviction of so great a traitor. *I have not furnished any report of the court to his Excellency the Governor*, because, as his Excellency is now at Kingston, I apprehend all my report should be made through you, my immediate commanding officer. Hoping, as heretofore, to gain your approval, I have the honour to be, &c. A. A. Nelson, Brigadier-General, commanding the field forces. To Major-General O'Connor, C.B."

(*c*) Evidence of General Nelson. "I received G. W. Gordon on the 20th of October; he was landed from the Wolverine, and then placed *under my charge*; received no instructions whatever, except that I received a box of documents; when I went on board I was instructed by his Excellency the Governor to examine the mass of papers, and, *if I found sufficient evidence, to have him tried*; went ashore; went through the papers, and selected them; the court-martial was to assemble under my orders; *I* framed the charges; the proceedings were sent to *me* for confirmation."

propriety of the Governor's conduct in ordering the arrest, with a view to a trial by court-martial, and in allowing the execution of the sentence, that the Commissioners entered (*a*) into enquiries as to the grounds of the belief in the prisoner's complicity in the rebellion; and particularly of his actual intent, especially with reference to the graver charge of inciting to actual insurrection and massacre.

As regarded the arrest and removal of the prisoner, for which alone the Governor was responsible, evidence was entered into, as to whether the facts justified him, morally as well as legally; and as to this, persons in the highest position, and of the best means of information, firmly believed the prisoner to be the author of the rebellion; and, on the other hand, there was sworn evidence of an act of seditious incitement in the declared district, for which he was liable to be tried there, and nowhere else (*b*).

(*a*) Thus, in the course of the examination of the late Governor on this head, Mr. Gurney—"You mention his having been immediately connected with the leaders of the outbreak. Was that anything more than a political connection?" Mr. Eyre—"Political, personal, and religious, to the best of my belief. I had reason to believe that, whatever his object may have been, the language used by him had really led to the insurrection." Mr. Gurney—"Had produced a state of feeling which led to the insurrection? But had you received any information tending to show that he was the *instigator* of this particular outbreak?" Mr. Eyre—"We know that he had circulated seditious placards, containing attacks upon persons by name, upon some of those very persons who were subsequently murdered. I had seen the seditious placards in which these attacks were made, and prior to the capture of Gordon, I ascertained that he was the person who circulated the placards. I have since discovered that it was he who wrote them, the original draft of one of the placards, in his own hand, having been found in his possession. I refer to the placard headed 'The State of the Island.'" All this, of course, as the learned Commissioner was well aware, was not material in a *legal* point of view, whether the trial was legal or illegal. If legal, as it could not be so unless martial law existed, sedition was capital, and actual intent immaterial (*vide ante*, p. 181). If illegal, then again, in a legal point of view, the guilt of the prisoner, and, still more, his grades of guilt, would be wholly immaterial, his execution was, in a legal sense, a murder. But, in a moral point of view, all this was most material.

(*b*) Thus, one of the Judges, Mr. Justice Ker, stated: "I consider that the dissatisfaction which prevailed in this island is mainly attributable to the teachings of such persons as the man Gordon, and am certain that the occur-

It has already been seen (*a*) that the scope of the Commission, under this second head of enquiry, was rather the moral than legal character of the conduct of those engaged in measures of suppression. And this applies especially to the enquiry into the cases of those tried by courts-martial, and the observations of the Secretary of State, especially as to Gordon's case (*b*), seem accountable on no other view.

Their examination also appeared, in accordance with the terms of the Secretary of State's despatch on the subject (*c*), to imply that, to the Crown, the Governor had to justify

rences were caused through a treasonable agitation by the man just mentioned." And Mr. Westmorland, a member of the Council, states that the Executive Committee, in their official capacity, considered the arrest of Gordon, and were consulted by the Governor as to his arrest; and there was an affidavit from the post-mistress at Morant Bay, that communications had passed between Gordon and Paul Bogle (*vide ante*, p. 181). The Governor told him that he was going to arrest Mr. Gordon, and asked him if he approved of it, and he said "Certainly." He was not consulted about him, after his arrest, by the Governor, the General, or anybody else, and took no further interest in Mr. Gordon's case; he was *handed over to the military authorities.*" So that, according to the view of this member of the Council, the responsibility of Governor and the Council ended with the arrest, and that the case then rested with the military authorities.

(*a*) *Vide ante*, p. 315.

(*b*) For the Governor was told that the Government desired to see it clearly established that Gordon was not executed until circumstances had been proved against him which deserved death, and that his death was necessary, &c. (*vide ante*, p. 236), as the Governor, nor any one else, who had acted under lawful authority, could not be called upon legally to establish anything; but those who accused them of abuse were bound to prove it. And legally, of course, they could not be called on to prove that the execution was necessary, if the trial was lawful. But, *morally*, it would make all the difference. Neither could he be legally called upon as Governor, "clearly to establish" that crimes had been found against Gordon which deserved death, for that was the business of the court-martial and the Commander-in-chief. Still less could the Governor be called upon "clearly to establish" that the prisoner had committed a crime which, at *common law*, was capital, seeing that he was tried and convicted, under martial law which makes many offences capital, only venial under common law: seditious words, for instance, with or without any *intent* to cause rebellion.

(*c*) *Vide ante*, p. 236.

himself morally for the arrest and trial, by establishing (*a*) that some crime had been proved against the prisoner, for which he was liable to the capital penalty, and that his death was necessary for the suppression of the rebellion. But this, it is to be presumed (*b*), pointed not to legal justification, but to moral justification, in the judgment of the Crown, for allowing the trial and execution.

For the same reason, and upon the same grounds, the Commissioners entered into the question, whether he was guilty of inciting the people to sedition (*c*), or to massacre; that whether he used such incitements, in point of fact, that is, by the use of language calculated to have such an effect; or whether there was *express evidence* of a design and intent to produce that effect.

The scope of the enquiry being far larger than mere legality, and embracing, as it did, the moral propriety of the

(*a*) In strict law, it is conceived, the Governor was not called upon to establish anything at all, for having acted in the exercise of lawful authority in having the man arrested on suspicion of complicity in rebellion and felony in a certain district, and sent him there in custody, where he was liable to be tried either at common law *or* by martial law; his legal responsibility ended there, and it will be seen that he was not, and could not, be *legally* responsible for the prisoner being put upon his trial by court-martial, because he had no authority to direct it, and did not direct it; and the sole authority to determine whether there was jurisdiction to try the man by court-martial rested with the Commander (*vide ante*, p. 178, *et vide* p. 174). But, nevertheless, no doubt he was morally responsible for allowing the man's execution, and this was an enquiry into his conduct on the judgment of the Crown.

(*b*) For reasons above given; for, otherwise, the view taken by the Commander would be erroneous, since sedition is capital by martial law.

(*c*) A sedition is capital by martial law (*vide ante*, p. 187); it would not be *legally* material whether the prisoner was guilty of inciting to sedition, or whether he was privy to a conspiracy to murder, any more than it could be *legally* material, supposing him to be guilty of any capital offence, whether his execution was necessary for the suppression of the rebellion. But, in a *moral* point of view, and in the opinion of the *Crown*, for the information of whose conscience the inquiry was conducted, it would, of course, be most material, whether the man was guilty of the greater or the lesser offence; and, in the *latter* view, whether there was any necessity, or apparent necessity, for his execution.

proceedings adopted, it would comprise, as regarded this "leading case," the sufficiency of the evidence, morally as well as legally, to justify, not only the arrest and the trial, but the execution (*a*). And, as it is manifest that, as this must a good deal depend upon the moral effect of the evidence, and as there is nothing in which the difference of men's minds so influences their judgment, on a matter necessarily one of mere opinion, this part of the enquiry was one of considerable difficulty and delicacy.

The evidence, it is obvious, could only be properly considered with careful reference to the charges made against the prisoner, and upon which he was tried, which were as follows: 1st. High treason and sedition, *i.e.*, treason *or* sedition. 2nd. Having complicity with certain parties who were engaged in the rebellion, riot, or insurrection (*b*), at Morant Bay, on the 11th October, 1865. The legal effect of which, as already shown, was, that he was charged with sedition, whether or not treasonable (*c*), or with being in com-

(*a*) The summary of the evidence already given (*vide ante*, p. 194), though sufficient for the view in which it was then presented, merely with reference to the strictly legal consideration, whether there was any evidence to warrant a conviction, was far from adequate to convey any idea of its real force and effect, which, indeed, cannot fairly be estimated by attending only to the express evidence, *i.e.*, the bare facts, expressly proved, without likewise taking into account the *notorious* facts of a general nature, which the court could not discard from their minds, and might fairly and legally consider, as giving significance to those facts, and also the inferences which they were at liberty to draw from those facts. For the evidence before the court comprised all these three branches, notorious facts, proved facts, and obvious inferences. (*Vide ante*, p. 193.)

(*b*) There was a preamble, reciting that, before the time of the insurrection at Morant Bay on the 11th October, 1865, when the rebels massacred the Custos, and divers other persons, being Justices of the Peace, &c., assembled in the vestry on such day, the said G. W. Gordon did, in furtherance of the said massacre, at divers periods, previous to the same, incite and advise with certain of the insurgents there, by his influence tending to cause the riot, whereby many of Her Majesty's subjects lost their lives; but the charges on which he was arraigned were as above stated, though they might be interpreted by reference to the preamble.

(*c*) That is, be it observed, complicity with them, not complicity in the massacre, complicity with them in inciting to rebellion, sedition, or riot,

plicity with the leaders in *inciting* to sedition, both which would be capital under martial law.

Upon these charges, it would be sufficient to show (*a*)

not necessarily, in inciting to the massacre, still less in intentionally inciting to it (*vide ante*, p. 181), though it would include the graver charge. To sustain a capital charge at common law, it would be necessary that it should involve either treason or murder. But, under martial law, inciting to sedition would be capital. (*Vide ante*, p. 187.)

(*a*) The evidence, arranged under heads, was as follows :—First, *general* evidence of close association with the active leaders, the actual chiefs of the murderers, Bogle, M'Laren, Chisholm, Clark, &c. 1. Letter from Gordon to Chisholm, "Tell Clark and Bogle to enquire at the post-office for papers. I have been at Vere, where the poor people are wretched," &c. 2. Other similar letters, "We must not lose heart," &c. 3. Evidence of Gough, the post-mistress, as to correspondence between Gordon and Chisholm, M'Laren, and Bogle, &c., and particular proof of a printed copy of an address to the people, sent by Gordon to Bogle. Secondly, evidence of more particular association between them. 1. Evidence of James Gordon that M'Laren had stated, showing a letter from Gordon, the prisoner, that there must be a meeting, &c. 2. Evidence of George Thomas, that Bogle had made similar statements, also showing letter from Gordon, the prisoner. 3. Proof by Gough that the prisoner had written to M'Laren (who was present at the massacre), shortly before the outbreak. 4. Proof by Anderson (a witness called, and cross-examined), that he had seen Gordon at Stoney Gut (the seat and stronghold of the rebellion, and the residence of Bogle), and that he said to Bogle that they were going to have a meeting, and that if the blacks did not get the back lands, the whites must die. 5. Proof, by Williams, that Gordon held meetings, at which there were tickets signed by him, and at which he said that the whites got all the money, and the blacks did all the work, and that the blacks would get the land for nothing, and that the men at Stoney Gut were Gordon's friends. 6. Proof that when Gordon was arrested, he had in his portmanteau a number of such tickets, which it was notorious had been used for meetings convened by the ring-leaders of the massacre, and some of which had been found in houses of the rebels (*vide ante*, p. 336). 7. Proof, by Thomas that there were meetings at Bogle's place, up to the day before the massacre, and that M'Laren used to act as secretary at those meetings. Thirdly, proof of particular acts by the prisoner. 1. The speech about Hayti, that the blacks were to do as they had done there (*vide ante*, p. 274). 2. The proclamation to the people, as to the state of the island (*vide ante*, p. 274). 3. Proof, by Thomas, that he had advised the people not to pay for their lands, and that they must seek for the white people first (*vide* Ev. of Thomas, *ante*, p. 279). 4. Proof that Gordon said his people would be revenged on his political opponents, who were, in fact, murdered by his associates Bogle, M'Laren, &c. 5. A letter of his, in which he referred to that massacre without a word of reprobation.

that the prisoner was a party to a design, by the leading rebels, to incite to rebellion (whether or not he intended, or incited to, an actual massacre), and this did not require to be proved by express evidence, but might be proved by circumstances, and by way of inference from other facts, which led naturally to the conclusion of such complicity, as, by such intimate association between them and the prisoner in a seditious system of agitation, as to make it probable that he knew what they were doing, and improbable that they were proceeding without his knowledge.

As to the effect of the evidence, it would be for the Court to consider. The substantial question, it is manifest, would be, whether there was a fair trial, as to which the first and great question would be, whether there was any evidence, as to which it is to be borne in mind, that the evidence comprised, not merely the bare facts *expressly* proved, but the notorious facts which gave them significance (*a*), and the *inferences* which men might fairly draw from the express (*b*) facts, thus interpreted by notorious facts.

And, as the effect of evidence is matter of opinion (*c*),

(*a*) *Vide ante*, p. 398.

(*b*) It is the peculiar province of the jury to draw *inferences* of fact (*Hunter* v. *Gibson*, 2 H. Blackst. rep. 187; *R.* v. *Burdett*, 4 B. & Ald. rep. 318); and a court-martial are jurors; and thus, for instance, from the notorious fact that there had been a rebellion, of which Bogle and M'Laren were active leaders; and the fact, as notorious, and also expressly proved, that they and Gordon were closely connected together in a system of agitation, the court-martial might draw the inference, that it was not probable that it could have gone on, without Gordon's privity, or that those who were thus associated with him would carry it on, to such a terrible outbreak without his knowledge and approval. It was in the last degree improbable that they would do so, and this, no doubt, was a consideration present to the minds of the members.

(*c*) For instance, the force and effect to be given to the facts, that meetings had been held at Bogle's, up to the day before the outbreak, and that Gordon had been in correspondence with M'Laren, who always attended these meetings, within a day or two of the event; and that Bogle and M'Laren were present at the massacre, and that they murdered Gordon's political opponents; and that Gordon, in writing of it, said not a word as to its being a criminal act;—the effect of these facts would very much depend upon a man's opinion, as to the *probability* either of Bogle and M'Laren

and especially when it rests on circumstances, the mere fact that certain evidence fails to bring to some men's minds the strength of conviction which it has brought to the minds of others, would not be enough to warrant any imputation upon the conviction as unfounded, or unjustifiable.

The impression which had prevailed, that the evidence was not sufficient, had arisen, it was manifest, from an erroneous notion as to the law (*a*), viz., that it was necessary to prove an offence capital by the ordinary law, to which end it would have been necessary to prove incitement to the particular massacre, and not merely general incitement to sedition or rebellion (*b*), though, indeed, even if it had been necessary, there was evidence of direct incitement to massacre (*c*), which might legally have involved a liability for any massacre, as a natural result of such incitement (*d*).

The evidence, however, would be sufficient, if it showed general incitement to sedition and rebellion, whether or not there was incitement to massacre; and in either view, it would suffice, if language had been used calculated to incite to rebellion or to massacre, whether or not there was incitement to that *particular* massacre, or to a massacre on that particular occasion (*e*).

going on to such a terrible step as this without Gordon's knowledge, or of their doing so without his approval. And this would be necessarily a matter of mere opinion, on which, to say the least, the court would be entitled to hold theirs.

(*a*) *Vide ante*, p. 396.

(*b*) Which would be capital under martial law, *vide ante* pp. 65, 187.

(*c*) There was the Hayti speech, *vide ante*, p. 274, and the positive evidence of witnesses, that similar language had been used on other occasions.

(*d*) And it would be sufficient, if the natural result of these incitements was a rising with a view to a massacre, whether or not Gordon actually intended it. (*Vide ante*, p. 181, *et vide* F. Stephens's Crim. Proced. 187.)

(*e*) *Vide ante*, p. 398. And as to this, the evidence was direct and positive, in addition to the Hayti speech (*vide ante*, p. 274), and the seditious proclamation (*vide ante*, p. 113), that Gordon had used language, on other occasions, to the effect that the blacks were to rise and massacre the whites, in order to get the back lands. There was the deposition of Thomas, to the same effect as his evidence (*vide ante*, p. 279), and there was the evidence of one Anderson, to the same effect. And there was evidence of close

Another cause of the impression was, that the power of the court to draw *inferences* from facts proved, and to interpret them and apply them by the light of notorious facts (*a*), was entirely ignored. Yet, it must be manifest that they possessed both these powers, unless it is meant that they were to require formal proof of facts known throughout the whole island, as, for instance, the rebellion itself, or that they were not to draw the plainest inferences from facts, without which, the evidence would lose all its significance and force.

It would be material, both in a legal and a moral point of view, whether the prisoner had had a fair trial (*b*),

association with the ringleaders in meetings, which were known to have been seditious, and some of which were, as above, proved to have been so. There was evidence that he had spoken of these at Stoney Gut, the seat and stronghold of the rebellion, where the drilling, &c., had been going on, and where the chief active leaders resided, as his friends; and there was evidence that he had said, that his people would be revenged on his political opponents, who were, in fact, murdered by them.

(*a*) Thus, it was proved that Gordon was in close and confidential intercourse with the ringleaders, at the seat and stronghold of the rebellion—Stoney Gut—and, it was manifest, he had been so for some time. Hence, the double inference might fairly be drawn, first, that he must have known that they were getting up a rebellion there, and that they would not have carried it on without his concurrence. It was scarcely possible that they *could* have kept secret from him, all the measures that were going on there, even if they had desired to do so; and it was not to be supposed that they would carry on a scheme of rebellion, and carry it on to actual insurrection, and even massacre, without the knowledge of the man they looked up to as their leader. When these plain inferences are drawn, the fact of their close and confidential intercourse with him assumes an entirely different aspect, but, without them, it loses all its force and significance.

(*b*) That is, a distinct statement of the charge, production of the written evidence and examination of the witnesses who are produced, in the presence of the prisoner; hearing and attending to any observation of his, on the weight or credit of the documentary evidence, and allowing him to cross-examine the witnesses produced; listening fairly to his defence, and letting him call any witness he can produce; and, if he applies for an adjournment, to enable him to produce witnesses on any point of his defence, allowing him to do so, if the court see that it is material, and that the application is *bonâ fide*. All these are matters of the substance of justice, though the latter, it is obvious, must, in all courts, rest a good deal in the judgment of the court, for the prisoner, in any case, would be glad of an excuse for delay. But, as to the mere departure from, or non-observance of, the strict legal rules of evidence, as, for instance, receiving the depositions of absent

that is, not according to the strict legal rules of evidence or procedure—which, of course, could not be expected to be observed before a drumhead court-martial by military men, who did not understand them—but those rules of substantial simple justice, which are of universal obligation, and the wilful and material violation of which invalidates any judicial proceeding. And, therefore, the Commissioners directed their enquiries carefully to that point.

The great question, in a legal and moral point of view, would be, whether the prisoner had a fair trial, and, as to this, much evidence was taken. The only grounds (*a*), on

witnesses, or oral evidence of the contents of written documents; these are not necessarily of the substance of justice, and rather go to the weight, value, or credibility of the evidence, of which, it is to be supposed, the Court will judge, and not decide upon such evidence alone, although it might be useful, as confirming, or confirmed, by other evidence.

(*a*) For instance, objections to the admissibility of the *depositions* of witnesses, which, no doubt, would have been inadmissible in a criminal trial at common law, but, surely, under martial law, went only to the value or weight of the evidence. Then, there was an objection suggested as to the custody from which the documents were produced, and their genuineness, and the absence of formal proof of them, and so forth; as to which it is enough to observe that the General in command had carefully examined them, and doubtless was satisfied as to them, and, further, that the *prisoner* never objected to them, nor disputed their genuineness. The same answer applies to a very technical objection, taken before the Commissioners, as to the proof of the seditious proclamation, that the original was not produced, although the witness had seen it, and the prisoner did not object to the printed copy which had been published all over the island in his name, and did not dispute the authorship. The learned Commissioners, of course, were aware that secondary evidence is admissible, if not objected to. These are specimens of the objections taken. No doubt, any lawyer could easily pick holes in much of the evidence, but were two learned judges sent some thousands of miles to pick holes in the proceedings of a drumhead court-martial? It was attempted to make out that the court ought to have adjourned, in order to enable the prisoner to call some witness, upon a point quite collateral, if not immaterial, viz., to account by illness for his absence from the meeting of the vestry (which he usually attended), on the occasion of the massacre. But it did not appear that he himself *applied* for an adjournment, and even if he had, it was entirely for the court, in the exercise of its discretion, to allow or disallow it, and, not only was the point collateral and unimportant, but his own witness had disproved the excuse he set up.

which it was apparently attempted to impeach the fairness of the trial, were grounds not taken by the prisoner himself, and such as were rather based upon strict, if not technical rules, than upon those principles of substantial justice, which alone are applicable to trials by court-martial, especially under martial law.

The only grounds on which the fairness of the trial was attempted to be impeached, was the omission of the Court to adjourn, in order to allow the prisoner the opportunity of trying to produce some witness to prove something to explain matters, entirely collateral, and, indeed, comparatively immaterial (*a*), on which he had produced a witness who did not support his statement, and upon this, it appeared, that he did not himself ask for adjournment.

This could hardly affect the substantial question, which was, whether he had a fair trial. The Commissioners entered, it is true, also, into other matters, and into the non-observance of the legal rules of evidence, as to the reception of depositions of absent witnesses (*b*), or of

(*a*) That is, that he had been absent from the mutiny at which the massacre took place, and at which it was admitted he would ordinarily have been present. It was said he wanted to call one Major, to prove that he was ill. It was not proved satisfactorily that he asked for a postponement, and it was positively proved that he did not (Ev. of Young); but it is quite immaterial, for it would have been idle, even if he had done so. For his excuse being that he was ill, a witness, whom he *did* call, disproved it, and the court might, fairly enough, disbelieve the fact; but even if they believed it, it would only dispose of one point, a mere bye-point, out of a great mass of evidence against him, and they best knew whether its explanation would have materially altered the case in favour of the prisoner. It seems quite immaterial, but as to the matter of *fact*, though it was proved that he was unwell, it was also proved, out of the mouth of his own witness, that he did not appear to be ill, and was up, and dressed; and it was proved by other witnesses, before the Commissioners, that he was well enough to be out and about just before and just after the massacre, and that the real reason why he was not present at the mutiny was, that he *knew there was to be* a *massacre*, for he himself said, no doubt falsely, that he *told the Baron not to go* (*vide ante* p. 282, Ev. of Lee), and his own agent, Lawrence, was privy to it.

(*b*) No doubt, nothing can be more salutary, as a general rule, than that witnesses should be produced to be cross-examined, and that documents should be produced to speak for themselves; and if they are *kept back*, wil-

oral evidence of the contents of written documents, and the like ; but this, it is to be presumed, was not upon the view that these rules are obligatory upon drumhead courts-martial, under martial law, but with a view to ascertain how far their non-observance was wilful and intentional, or had operated, in the particular case, substantial injustice.

The Commissioners entered into various other matters (*a*) concerning this trial, which would have been irregularities in a criminal trial at common law, but which, even then, might have been waived, and would not have been necessarily material after verdict, and, it is to be presumed that, here again, they entered into these matters, not with any

fully, there may be great reason to suspect real injustice ; but if it is merely that they are absent, and that the court, under the circumstances, is satisfied that their presence would not be important, especially if there is other evidence which *is* legally admissible, then, it cannot be said, that there has necessarily been any violation of substantial justice. In this instance, it turned out that there had been none, for the witnesses, whose depositions were most important, were examined before the Commissioners, and cross-examined, and entirely adhered to their statements, and were not shaken in the least (*vide* ev. of Humber, Peart, and Geo. Thomas). At all events, it seems clear that these rules are *not* obligatory on courts-martial, under martial law.

(*a*) Defect of proof, for instance, as to the custody of the documents produced, or as to the regularity of the depositions, &c. No doubt, a lawyer might pick holes in much of the evidence ; as, for example, there was no formal proof that the portmanteau produced, containing tickets for meetings, such as had been used to convene the seditious meetings, and found in the houses of rebels and murderers (*vide* Hobbs' evidence, *ante* p. 336), was the prisoner's, nor of the exact identity of the tickets with those thus found ; but then, in the first place, the General had received these things, and, it is presumed, had satisfied himself that they were what they purported to be (and, on a common law trial, it is for the judge to satisfy himself that secondary evidence is admissible) ; and next, these irregularities would be of no manner of importance, unless the prisoner denied the genuineness or identity of the things ; and it does not appear that he denied the trunk to be his, nor the tickets, and they, on the face of them, purported to be for meetings just of the same character as the seditious meetings ; and though he must have seen the meaning and the force of their production in proof against them, he said not a word either against their reality or against the rational inference to be drawn therefrom.

view of their legal importance, but as throwing light upon the fairness of the trial.

It was elicited that several of the witnesses, in Gordon's case, had not been personally produced and examined in the presence of the prisoner, so that they might be cross-examined by him, but their depositions, taken at a distance, before magistrates, were put in and read (*a*). But it did not appear that this was done from design, to keep the witnesses back, to *prevent* them from being examined in the presence of the prisoner, or that he objected to the admissibility of the depositions.

And although, no doubt, it is deemed, in our law, very desirable and very important that witnesses should be examined personally in the presence of the prisoner, in order that he may cross-examine them; this is rather a matter of positive law (*b*) than of natural justice (for the ideas and usages of other nations differ from ours upon that point); and, moreover, it is one of those matters which may well be *waived* by a prisoner, who best knows the importance, in the particular instance, of the personal production of

(*a*) Thus, the depositions of the two witnesses (Peart and Hunter), who proved the speech about Hayti (*vide ante*, p. 115), and the deposition of the witness Thomas (*vide ante*, p. 279), and one or two more. But, as to Thomas, he was ill in the hospital, and, by the law of England, his deposition would have been admissible if taken in Gordon's presence, and it is a mere matter of positive law which excludes depositions in any case; and the presence of witnesses, though highly desirable, is not of the essence of justice; at all events, if they are not kept back to prevent their being cross-examined, but their depositions are admitted simply to save time, the witnesses themselves being at a distance. And as the prisoner did not object to the admission of the depositions, they were not illegally received.

(*b*) It is well known that, in some foreign countries, depositions are taken, in the absence of the accused, and the witnesses are not cross-examined by him, (*vide* Mr. Fitzjames Stephen's interesting work on Criminal Procedure, p. 164), and although ours is certainly the best, it is hardly one of the dictates of natural justice, that a witness should be produced, especially if the prisoner does not require it. And Gordon did not object to the admission of these depositions, though he commented on their *value*. And it may fairly be said that if they had been the *whole* evidence in the case, probably the court-martial would not have convicted. But they were confirmed by evidence which was strictly admissible (*vide ante*, p. 399).

witnesses, and perhaps is aware that they would give *far stronger* evidence against him, if called (*a*).

As, therefore, the non-production of a witness to be personally examined, is not necessarily a disadvantage to a prisoner, and may, on the contrary, be an *advantage* to him (*b*), which he best knows, it would be too much to say that their non-production, especially if he did not insist on their production, was any substantial violation of justice.

The Commissioners took great care to enquire whether any substantial injustice or injury had been done to the prisoner by the receiving these depositions; and with this view they had before them the witnesses whose depositions had been received, and examined them, and allowed them to be cross-examined, and, beyond all doubt, they adhered to their depositions (*c*), and were not shaken in the least.

It is to be observed, with reference to adjournment of a trial by court-martial, that at common law there can be no adjournment of a criminal trial, however much it may appear that there is a witness absent, who may be able to exculpate the accused (*d*). And under martial law, the very

(*a*) Which really was the case (See the ev. of Thomas, *ante* p. 279).

(*b*) It is obvious that, if a witness is stating the truth, cross-examination will only make it more apparent. And, again, a hastily taken deposition may contain only half of what he can state, which is seen constantly exemplified in depositions taken before magistrates, and sent to the assizes. On the other hand, if the witness be stating truth, cross-examination can do no good, while it may do much harm to the prisoner. And whether they have stated truth, the prisoner knows, and the court can judge a good deal from the rest of the evidence. It would be absurd, therefore, to imagine that the non-production of these witnesses was necessarily any prejudice to the prisoner. On the contrary, it was possibly an advantage.

(*c*) *Vide ante*, p. 279, the evidence of Thomas, one of the men whose deposition was received. So the two witnesses (Peart and Hunter), whose depositions had been received as to the speech about Hayti (*vide ante*, p. 115), were produced before the Commissioners, and examined, and cross-examined, and they were not shaken in the least. On the other hand, new witnesses added further evidence, who rendered the prisoner's guilt clear. (*Vide ante*, p. 282.)

(*d*) He will be told that he ought to have applied to the court to put off his trial, or that he ought to have secured the attendance of his witnesses.

essence of which is the necessity, by reason of an emergency, for more prompt and speedy deterrent measures, it would be strange, indeed, if there were any obligation on a court-martial to adjourn a trial, merely because the prisoner asked it.

That the prisoner suffered no prejudice, but rather an advantage from the trial not having been postponed or adjourned, was made apparent in this way, that, whereas by the evidence at the trial it was proved that the prisoner had incited to insurrection, if not to massacre, it was clearly and conclusively shown, by the evidence taken before the Commission, that he had been privy to the conspiracy, not only for insurrection, but for the massacre (*a*)

It is to be observed here, that the great object of martial law being to admit of more prompt and speedy deterrent measures than can be attained at common law, it would make it of no avail, if those strict rules of evidence were to be observed, the effect of which must necessarily be to interpose great delay, while the legal evidence is being

In this case, Gordon had been several days in custody, and knew that his trial was coming on, and he made no application, either to put off his trial on the ground of absence of witnesses, or to secure their attendance. Even, therefore, if he *had*, in the course of the trial, made such an application, he was clearly too late. No prisoner on his trial, even for a capital offence, would or could be allowed such an indulgence by the common or statute law of England. But it was proved that he made no such application, and that, if he had, it would not have had any real ground.

(*a*) Thus, at the trial it was proved that he had said his people would be revenged on his opponents, who were, in fact, murdered on the occasion; and it was proved before the Commission that he spoke of their fate with evident exultation. (Evidence of Walcott.) It was proved at the trial that he had denounced them in the most violent terms; it was proved before the Commission that he had a pecuniary interest in the death of the Custos, of which he afterwards spoke, there being a suit between them, which abated. (Evidence of Walcott.) It was proved at the trial that it was *probable*, from his intimate connection with the ringleaders, and his saying that those who lived at the seat and stronghold of the rebellion were his friends, that he was aware of what was going on, and it was positively proved at the trial that he was aware of it, for it was proved that he said (no doubt falsely) that he had warned the Custos not to go to the meeting. (Evidence of Lee, *vide ante*, p. 282.)

obtained (*a*). Thus, to procure the attendance of witnesses at a distance, would cause a delay of several days; and the very necessity for martial law, a present emergency, would render such delay inadmissible. It would have necessitated a postponement of the trial.

The great question, both moral and legal, was, whether the prisoner had had a fair trial, and this, it was clear, he had (*b*). That is, he heard the evidence given against him; anything he had to say upon it, either in the way of cross-examination or observation, was listened to; he was heard patiently in his own defence, and any witness he had he was allowed to examine in his defence.

(*a*) It was an important part of the case that, as stated by the Governor at the outset (*vide ante*, p. 128), and proved in various ways, there were not many facilities for travelling in the island, and internal communication was rather difficult. To have obtained the attendance of the witnesses, would certainly have caused a delay of several days.

(*b*) The very witness who was brought forward to prove that he had not had a fair trial, a coloured man named Lake, had written at the time that he had, and was cross-examined by Mr. Gurney:—In one of your despatches, published in the *Colonial Standard*, you say, referring to Gordon's trial, "He was given a very impartial trial, and was allowed to cross-examine all the witnesses, through the president of the court; and, above all, was permitted to enter into a lengthy defence." How did you reconcile that with your opinion, just given, that Gordon was not given a fair trial? The witness.—My opinion at that time was that he had had a fair trial. I have since formed a different one. Mr. Gurney.—What has induced you to alter your opinion? The witness.—Because I think patience had not been exercised towards him in recalling Dr. Major, whom, he stated, could tell of his being ill, and by whom he expressed his intention of not going to the vestry, from his illness. In reply, the president said, "Dr. Major is not in court, nor is he on the Bay." Mr. Gurney.—Did Mr. Gordon ask for a postponement, or that Dr. Major should be sent for? The witness.—*He did not.* Mr. Gurney.—You said in your examination, that justice in the court-martial, under Lieutenant Brand, was not fairly meted out, or words to that effect, and complained of their haste. I find, in a despatch in the *Colonial Standard*, you say, "Lieutenant and Commander Brand is a credit to the service to which he belongs, and to the Crown he serves; patient, calm, deliberate, with a mild voice and manner; as president of the court-martial he gives every prisoner, however proven to be guilty, his own way of questioning witnesses through him, and the right of entering into his defence." The witness could only repeat that he thought so then, but did not think so now.

What was meant by a "fair trial," was clearly understood, and indicated by the points to which the Commissioners directed their examination;—a patient hearing, full opportunity for cross-examination, comment, or observation, and an adjournment, if applied for, and if it appeared necessary for justice (*a*), as to which, however, there was no satisfactory evidence, even that it was applied for, and positive evidence that it was not (*b*); and, moreover, it plainly appeared that, if it was, it was on a point not material (*c*).

All other points would be immaterial,—morally and legally; except that which would, in a legal point of view, be fundamental; and which underlies every part of the proceedings—viz., *legality*. This, it is manifest, would not be affected one way or the other by any number of mere irregularities or departures from mere formal rules of procedure, nor even necessarily by some degree of error,

(*a*) See the cross-examination of the man Lake, by Mr. Commissioner Maule. This man stated, at the time, that Gordon had a fair trial, and now said, "I do not consider Mr. Gordon had a fair trial; he was interrupted in the latter part of his defence by the president, who said, 'that closes your defence.'" In my opinion, I think that the words were not put as a question, but rather for the purpose of stopping Mr. Gordon." But he admitted that Gordon was allowed to resume and continue, and that he was allowed to cross-examine all the witnesses. And it was elicited by his Excellency the President. The proceedings of the court commenced at two or three o'clock in the afternoon, and the court rose by candle light, at seven or eight o'clock. The trial lasted for fully four hours and a half. Upon which he was asked by Mr. Commissioner Gurney,—Do not you think he was given a very patient trial?

(*b*) There would, of course, be no obligation to adjourn, on the application of a prisoner, unless it was really necessary for justice.

(*c*) As to this, there was the positive evidence of several witnesses. For instance, of Mr. Young, who was at the trial of Mr. Gordon, and took notes of that trial. He was there during the whole of the trial, and did not hear any application from Mr. Gordon for a postponement. "*I feel quite sure* he did not make application; I was very near him, about a few feet from him; my notes of that trial have been unquestioned." This was confirmed by other witnesses, quite as disinterested, and there was no reliable evidence that an application had been made and refused. Nor was it so stated *at the time*.

rashness, or want of care in the proceedings (*a*). If the trial was illegal, for want of jurisdiction, the utmost strictness in form could not help. If legal, no mere error in procedure could vitiate the proceedings; and if the trial was substantially fair, could not affect its propriety.

The question of legality, indeed, lay at the base, not only of the trials by courts-martial, but of all the measures taken; with the exception of the one or two instances of actual encounter. With these insignificant exceptions, *all* the measures taken were wholly illegal by the common law, which knows nothing, under any circumstances, of summary executions, or trials of non-military persons by courts-martial, or floggings, or burnings of houses. And these measures could only be legal by virtue of martial law, as expounded in these pages. So that, unless by virtue of martial law, *all* of them were illegal. But, under martial law, they would—so far as they were under orders—all be *legal*. And therefore, it is conceived, the trials by court-martial, which were all necessarily under military order and authority, would be legal.

The question of legality would be capable of being tested in the cases of sentences to punishments which had continuance, such as imprisonment, or penal servitude, because in such cases it might be raised without criminal prosecution, and the sentences might be remitted, if illegal (*b*). If

(*a*) A *total* want of justice, and *utter* want of evidence, or refusal of a fair hearing, might make the proceedings invalid; but not any degree of unfairness or injustice (however culpable any degree of it might be), or otherwise, every trial would be void which had not been perfectly fair; a conclusion obviously too extreme. Here again, the scope of the enquiry was shown to be that *degree* of impropriety which might be more or less censurable, though not criminal enough to render the proceedings illegal.

(*b*) *Vide ante* p. 388.

(*c*) The mere remission of the sentences, on considerations of clemency—or even of propriety—would not, of course, test their legality; nor their remission, on the supposed and obviously erroneous ground that the sentences must cease, when *martial law* ceased. Assuming that courts-martial were legal at all, these sentences could not lose their force merely because the *courts* were dissolved. The courts of assize in England are

the trials by court-martial were legal, of course these sentences would be as legal sentences as flogging or capital execution; but if, on the other hand, they were illegal, then *all* the sentences were equally so, including those which were capital. The mere circumstance that the courts had ceased to *exist*, could not, of course, affect the legality or validity of these sentences.

So far as regarded the enquiry into the measures taken in the suppression, and the conduct of those engaged in the measures of suppression, it is conceived, for reasons already stated, that the proper scope of the enquiry would be the *moral*, rather than the *legal* aspect of their conduct; at all events, assuming the prior and fundamental question of the *legality* of the declaration of martial law; for that, it is conceived, would (*a*) legalize all measures really directed under military orders and authority, to the carrying out of martial law, and the suppression of the rebellion.

The enquiries of the Secretary of State (*b*), had, it will have been seen, compared the question of the extent to which the measures had been caused, as indicated by the *numbers* who had suffered. The mere *numbers*, however,

temporary courts, and no one ever suggested that these sentences ceased; and when it was set up that committals for contempt did so, the point was overuled in all the courts. (*R.* v. *Charlesworth*, 1 B. & S.) It was stated that a large number of the prisoners sentenced by the courts-martial to terms of imprisonment or penal servitude, were released by the Colonial Government on that ground. That, however, would be such an obvious error, that it is presumed they must have been released upon larger and more political considerations.

(*a*) *Vide ante*, p. 230. If the acts done were really and honestly, however erroneously, directed to the carrying out of martial law, that is, honestly, however erroneously, in execution of orders, general or special, giving authority, under martial law; then, it is conceived, their legality could not be questioned even in a court of law, still less before an extraordinary and extra judicial commission of enquiry. If, on the other hand, the acts were *not* really carrying out martial law, that is, in the execution of orders, nor in the suppression of the disturbances, but wantonly and *without* lawful orders or authority, and from mere private malice, or lust of blood, or a spirit of cruelty, then they were criminal, and it is conceived to be unconstitutional to enquire into them.

(*b*) *Vide ante* p. 244.

by themselves, would not, it is manifest, be material (*a*); and to be made so at all, they must have relation to some other *data*, by which to suggest some proportion or comparison. And with reference to the question of excessive severity in punishment, any comparison of mere numbers would necessarily be a rough test; but the obvious *data* for this purpose would be the numbers of those *liable* to capital punishment, either at common law or under martial law.

Now, at common law, all those who had been present, aiding and abetting, on an occasion when the crime of murder was committed, would be liable to lose their lives (*b*). And, by martial law, all those who had been active in the rebellion, or the acts of outrage which were committed in it (*c*), were liable to summary execution.

Evidence was of course taken with great care, as to the *number* of persons who suffered (*d*), especially those upon whom death was inflicted, either in the field, or on summary enquiry, or by sentence of court-martial (*e*).

(*a*) For if a single man were killed carelessly and unnecessarily, it would have been excessive, though the fact that some had been, as it turned out, unnecessarily executed, would not, of itself, involve any blame to any one, unless he had been *carelessly* as well as unnecessarily executed; (*vide ante* p. 304); and, on the other hand, no number would be excessive which it was really and reasonably deemed necessary to execute—supposing a fair degree of care shown in the measures taken (*vide ante* p. 254).

(*b*) And the number present on such occasions would scarcely have been less than a thousand.

(*c*) The latter number could hardly have been less than four or five thousand, and the total number of those executed came to between four and five hundred.

(*d*) *Vide ante* pp. 372, 375.

(*e*) And it was satisfactory to find that the total number of these was very much under one-tenth of the probable number of those who had been active in the rebellion, and whose lives, therefore, were legally forfeited. The total number was estimated, after the most minute and careful enquiry, to amount to 438, that is, very much less, in round numbers, than 450. Considering the number of places, in a range of forty miles, from Morant Bay to Port Antonio, at which hundreds of negroes were engaged in acts of armed insurrection and outrage (*vide ante* p. 286), it does not seem

Evidence was also taken carefully as to the number of persons who suffered the minor punishment of flogging, and the nature and severity of the punishments actually inflicted in this way (*a*). So, also, evidence was taken as to the number of houses (*b*) or huts of the peasant population destroyed, under the belief of the owner's complicity in the rebellion. And, indirectly, evidence was taken as to the numbers implicated in the rebellion.

The probable numbers of those who were actively or passively engaged in, or aiding the rebellion, or disposed to do so, would be material; in reference to the measures taken; for the complaints against the officers, for the most part, appeared to resolve themselves really into this: that they used the deterrent (*c*) measures allowed by military law; and their defence, in substance, was, that they had done so, because it was necessary to do so, in order to deter a large and overwhelming proportion of the population from rising to renew the insurrection; and that, therefore, it was necessary to keep up these

possible that there could have been less than between 4,000 and 5,000 actively engaged in the rebellion; and if so, then the total number executed was not above one-tenth of those whose lives were forfeited to the law. This happens to be the proportion in which the soldiers of a mutinous regiment suffer the penalties of mutiny. The regiment is "decimated."

(*a*) Some hundreds were thus punished, and as it did not appear that any were flogged who were not found with plunder, or other proof of guilt, the number, whatever it might be, was only a tolerable indication of the number of negroes actually implicated. It is satisfactory to be able to add that very few women were flogged, and that these instances appeared to have been for the most without authority, and certainly contrary to the wishes of the superior military Commander. So some instances of aggravation of the punishment by binding up wire with the whips, &c., were unauthorized. As regards the number of lashes inflicted, there did not appear to have been any particular excess, 100 was the greatest number.

(*b*) They appeared, by official returns, to have been about 1,000, spread over a large part of the island, forty miles in extent. It is a curious fact that the number was about the same as that of the houses sacked, gutted, or destroyed by the rebels (*vide ante* p. 286). That the military orders not only did not warrant any excess, but prohibited it (*vide ante* p. 371.)

(*c*) According to the language of the Petition of Right (*vide ante*, p. 11), "the summary justice of martial law."

measures until the military force was strengthened throughout the island.

These considerations, it is manifest, would point strongly to the necessity for *deterrent* measures some time after the cessation of actual insurrection, with a view to prevent its *renewal*. And, as already pointed out, this necessity, or presumed necessity for such *deterrent* measures, would lie at the basis of the whole question as to the *nature* of the measures to be taken, or as to their *continuance*. And it would not be any reason for the cessation of *deterrent* measures, that, under the terror they inspired, actual insurrection had ceased, so long as there was reason to suppose that, on the removal of that terror, there would be a renewal of the insurrection (*a*).

And thus it was, that the same considerations bore out the *continuance* of martial law, and would point to its continuance, until the military had been reinforced throughout the island (*a*). Martial law having been proclaimed, was continued for a month; that is, for two weeks, after the ringleaders were secured and executed, and until the small military force in the island was reinforced, and the rein-

(*a*) *Vide ante* pp. 18, 30, 42, 209, 210.

(*b*) The duration of martial law, of course, must be determined by the same consideration as its declaration, viz., its real object; and if its object is the restoration of that peace and confidence which will allow the ordinary law to take its course (*vide ante* p. 210), it should be retained until such confidence is restored. There was a good deal of evidence to show that it was not restored until the military reinforcements had arrived and been distributed. (*Vide* evidence of Mr. Eyre and Mr. Westmorland.) Prior to the arrival of additional troops, there were in Jamaica only 1,000 men, all told, including sick men and men required for garrison duty. The *police force of the whole island was* 389, and in St. Thomas-in-the-East the force was 20, of whom most had run away. In truth, for the suppression of the rebellion in the disturbed district, there was not above 500 troops. (Evidence of Mr. Eyre.) The reinforcements did not arrive until the end of October. There was then a week's delay caused by a difference of opinion as to their distribution (*vide ante* p. 212), and then a week's further delay in their distribution. And then martial law expired. The amnesty had nothing to do with it; *that* was a measure of conciliation; the great point was as to the measures of protection.

forcements had been distributed, so as to afford, by their presence, a substitute for the deterrent measures of martial law.

For reasons already entered into, it is conceived that any error of judgment, assuming there to have been any in continuing martial law, could not affect the legal validity of acts done under military orders and authority, in carrying it out. It will, however, have been abundantly obvious, from this review of the enquiries of the Royal Commissioners, that in this, as in every other case of martial law, there was scope for a bill of indemnity, and that, practically, though not theoretically or legally necessary in law, it was required (*a*), on account, either of doubt (*b*), error, or irregularities, which form the proper scope of a bill of indemnity.

It would be, practically, to abolish the power of declaring martial law, if the validity of acts, done under martial law, were to depend upon the soundness of the judgment exercised in declaring or continuing martial law; for no officers would be likely to accept such a large and uncertain responsibility. According to the views submitted in these pages, all acts done *during* martial law, and in the district *under* martial law, and under military orders and authority, would be legal, and, therefore, would not require a bill of indemnity. And all acts done in or out of the district, and whether or not strictly under martial law, would be, if honestly for the suppression of the rebellion, proper subjects for a bill of indemnity (*c*).

(*a*) It was in this sense, doubtless, the law advisers of the Crown, in the Ceylon case, are stated to have said that a bill of indemnity was required (*vide ante*, p. 131, *in notis*). That is, that practically, it would always be required on account of errors or irregularities certain to arise.

(*b*) Doubts as to jurisdiction, as in the case of Gordon (*vide ante*, p. 186), as to which, the author considers the proceedings lawful, but others might be of a different opinion. Errors as to acts without orders. Excesses, as to arrests of persons out of the district under martial law, and *not* liable for acts committed within it (*vide ante*, p. 299).

(*c*) As an illustration:—If the Provost Martial has, by military law,

And, on the other hand, if the act were not really done either under martial law *nor* in the suppression of the rebellion (that is, with a view to it), although during martial law, and under colour of it, but wantonly and wickedly, then, not only would it require a bill of indemnity, but it would not be *covered* by a bill of indemnity (*a*), drawn in any form in which such a bill ever *has* been or is likely to be drawn.

Hence it was, that the scope of the bill of indemnity was, not merely acts done strictly under martial law, but all acts done in furtherance of its object, or honestly in the suppression of the rebellion, whether or not strictly under martial law. And so, also, the scope of the enquiry by the Royal Commission was not merely the measures taken under martial law, but *measures taken in the suppression* of the rebellion; some of which might or might not be under martial law (*b*).

authority to order the summary execution of a man, for an offence committed not only in his presence, but against himself, while acting in the execution of his duty, or by threatening his life, which would be capital by martial law, then the act of the Provost Marshal in executing Marshall, would be legal, and would not require a bill of indemnity (*vide ante*, p. 375). But if, although the offence was capital, he had no authority to order the execution, then the case would require a bill of indemnity. If he neither had authority, nor was the offence capital, and he did not really act with a view to his duty or his protection, but wantonly, then the act would be murder, and would not be *covered* by a bill of indemnity.

(*a*) For the object of a bill of indemnity is, not wilful and wholesale illegality, but casual, unintentional illegality, or, in other words, not conduct really criminal and wicked, but acts honest and well-meant, and which happen to be illegal, for some reason rather technical, or, at all events, founded on some strict letter of the law, as apart from its spirit; as, where the letter of the law has been violated in some particular case, for the sake of avoiding great public inconvenience, which would arise from doing the act in a strictly legal way, as, in making a few arrests out of a declared district, rather than proclaim the whole country, which would make the act legal.

(*b*) And if not so, as, if not done under military orders and authority, and if not justifiable at common law, they would require a bill of indemnity to protect the actors from legal liability, however honest and well-intended might have been their acts.

The constitutional scope of the Commission, therefore, so far as regarded the second head of enquiry, as to the measures taken in the suppression, was, it is conceived, substantially the same as the extent of the protection afforded by the common law or act of indemnity (*a*), to those who had been engaged in carrying out martial law, viz., their acts and measures really in execution of martial law, done for that object, however erroneously, or wrongly, or excessively.

All through the enquiries (*b*), the Commissioners were careful to keep constantly in mind, and to impress upon all who came before them, that though they could not *exclude* inculpatory evidence, the scope of their enquiries was not so much to consider charges against any one, as to inform the conscience of the Crown, especially as to the bill of indemnity, which necessarily raised considerations of a moral, as well as of a legal character.

Before stating the report of the Royal Commissioners, so

(*a*) And, as is conceived, rightly so, for reasons already explained. For it would not be constitutional to have an extraordinary Commission of enquiry into matters recognizable in criminal courts of law. And it would be contrary to all constitutional principle to hold a Governor liable, in a court of law, for mere errors of judgment in the exercise of a high governmental authority, and for which he is responsible to the Crown, and contrary to legal principle to hold men legally liable for mere errors or unintentional excesses, in the exercise of an absolute discretionary military authority in time of war, for which they are responsible only to the Crown. For acts, if any, not really done in the exercise of this military or governmental authority, but wholly beyond it, and either illegally for want of such authority, or maliciously and wickedly under colour of it, the courts of law would be the proper tribunals of enquiry.

(*b*) Thus, referring to an observation of Mr. Eyre's, that he was "on his defence": Mr. Maule said, "You put the case a little too strongly. You are not charged before us. The Royal Commission is only required to investigate all matters connected with the origin, causes, and mode of suppression of the late disturbances. There is no one charged before us." Mr. Eyre replied: "It is certainly the general opinion, both in England and in this colony, that I am on my trial; and I feel that I am virtually on my trial, being responsible as the head of the Government and controller of affairs."

far as it bore on the subject of martial law, it may be well to recur to its terms and its recitals.

The Commission recited:—

"That it is alleged (*a*) that great disaffection prevailed in the island, "and that evil-disposed persons had concerted the destruction of other "subjects therein. That grievous disturbances had broken out in the "island and had been suppressed, and that the said disturbances and sup- "pression had been attended with great loss of life, and, it is alleged, that, "excessive and unlawful severity had been used in such suppression. And "that it greatly concerns us that full and impartial enquiry should be "made into the origin, nature, and circumstances of the said disturbances, "and with respect to the measures adopted for the suppression of the same, "and the conduct of those engaged in such suppression."

The Commissioners (*b*), after sitting in Jamaica for many weeks, and taking the evidence of hundreds of witnesses, agreed to a Report, which, while entering into many particular cases, and details, not necessary to enter into here, contained much general matter, very valuable for future guidance, especially as it was adopted by the Crown; and which it is the object of the remainder of this work to embody and preserve.

In this Report there was nothing at variance with the

(*a*) That is, "severity unlawful," by reason of its being "excessive," not measures altogether illegal, for then the words "severity" and "excessive" would be surplusage. Measures which are illegal, are so, whether or not they are severe or excessive. But, on the other hand, measures which are lawful may be excessively severe, and they may be so through mere error, and if so, then they would not render the measures wholly unlawful, but the "severity" only would be "unlawful," *i.e.*, not lawful, and, therefore, the would not be *criminal*, though it might be culpable and censurable (*vide*, p. 363).

(*b*) Who, it is to be remembered, were, one military man, Sir H. Storks, and two lawyers, Mr. Russell Gurney, the Recorder of London; and Mr. J. B. Maule, the Recorder of Leeds; both of them sound lawyers and criminal judges, imbued to the utmost with those strict notions of criminal justice, to which the courts of law themselves have often alluded, as more favourable to the accused than to justice (*R.* v. *Suddis*, 1 East's rep. 316); and likely, therefore, to say the least, to be unfavourable judges of the summary severities of martial law. This observation is made, not as detracting from, but rather as enhancing the value and importance of, the general result of their report, so far as it affirmed the legality of martial law, and of the measures taken in carrying it out.

general views of the law upon the subject, which have been laid down in this work (*a*); while, on the other hand, not only was there much which went to confirm them, but the whole tenor of it, even the very censures which it contained upon particular measures, or particular instances, plainly affirmed the fundamental propositions which have been here laid down and expounded, the lawfulness of the declaration of martial law in time of rebellion, and the measures taken, under military order and authority, in carrying out martial law.

The Commissioners (*b*) distinctly adopted the view which

(*a*) There is not a word in it to imply that the proclamation of martial law was illegal; on the contrary, the statements that there was a rebellion, the praise bestowed upon the measures taken for its suppression, and the censures upon the continuance of martial law, all plainly imply that the declaration of martial law was perfectly legal. And the censures expressed on the *extent* to which the measures were carried, all of which would have been illegal, had not martial law the force and effect which has been here expounded, implied that it had that force and effect.

(*b*) On the disputed question as to whether the volunteers defending the Court-house at Morant Bay fired upon the people before or after they themselves were directly attacked, there was some conflict of testimony. After considering the matter, the Commissioners say, "that the fact appears clearly established, by the testimony of a large number of witnesses, that the crowd of blacks were aggressors by throwing stones, and that then the Captain having received authority from the Custos, gave the word to fire. It was proved that, before the 11th of October the negroes met and drilled, administered the secret oath, and in many ways showed, by their conduct and declarations, that the disturbances were not an accidental riot, but a planned resistance to the constituted authorities." The Commissioners said, "With this evidence before us, it was impossible to avoid arriving at the conclusion that there was, on the part of the leaders of the rioters, a preconcerted plan, and that murder was distinctly contemplated." The Commissioners quoted, and made special reference to Paul Bogle's (and nineteen others) letter, addressed to the Governor on the afternoon preceding the outbreak. (*Vide ante* p. 117.) They say of it, "It seemed to be relied upon as showing the peaceable intentions of the writers. We confess we cannot look upon it in that light. Its language is that of scarcely concealed defiance; and, looking at its terms, at the time at which it was written, and the acts by which it was accompanied and followed, it seems to us to partake rather of the character of a manifesto preparatory to, and attempting to justify, a resort to violence." The Commissionersfurt her stated "that the originators of the outbreak do not appear generally to have

has been presented in these pages, that the disturbances were rebellious in their nature, and had their origin in deep-seated causes, calculated to make them general and formidable, and especially in the desire for the expulsion of the whites, and the acquisition of their lands by the blacks; and they distinctly declared (*a*) that the Governor was justified in declaring martial law.

Moreover, the Commissioners set out in their Report a number of matters (*b*), which showed, beyond a doubt, the deep-laid design (*c*) in which the rebellion had its origin, and what imminent danger there was that, if not promptly put down, it would have become formidable, and probably fatal.

The general conclusions (*d*) arrived at by the Commis-

belonged to the labouring class, but were, for the most part, what are called free settlers, and their great desire was to obtain, free from the payment of rent, what are called the 'back lands.'"

(*a*) Concerning the measures adopted for suppressing the insurrection, the Commissioners say, "With the full knowledge of all that has occurred, we are, nevertheless, also of opinion that, upon the information before them, and with the knowledge they possessed of the state and circumstances of the island, the Council of War had good reason for the advice which they gave, and that the Governor was well justified in acting upon that advice."

(*b*) P. 29. Communications had been going on between Gordon and Bogle for some years, with evident reference to some rebellion; and many expressions dropped by Gordon proved that this was all along in his mind.

(*c*) P. 33. Gordon said that all the powers of the great Napoleon could not put down the rising in Hayti, and that it was successful, *because the troops died of disease, before they could meet the people in the mountains.* And he added that India was not a case in point, for India was a flat country, and the English troops could overrun and conquer it; but Jamaica was a mountainous country, and before the British troops could reach the people in the *mountains, they would die of disease.* This entirely confirmed and illustrated the judgment of the Governor. (*Vide ante*, p. 164.)

(*d*) "That the disturbances in St. Thomas-in-the-East had their immediate origin in a planned resistance to lawful authority. That the causes leading to the determination to offer that resistance were manifold:—that a principal object of the disturbers of order was the obtaining of land free from the payment of rent; and that some, moreover, were animated by feelings of hostility towards political and personal opponents, while not a few contemplated the attainment of their ends by the death or expulsion of the white inhabitants of the island. That, though the original design for

sioners were substantially the same as those presented in these pages, viz., that the disturbances were rebellious and dangerous, and formed a proper ground for the declaration of martial law; and, although they also arrived at the conclusion that it had been continued longer (not saying how much longer) than necessary, and had been carried out with too much severity—this, for reasons already adverted to (*a*), rather appeared to imply their legality.

And not only did they declare that the Governor had been entirely justified in proclaiming martial law, but (*b*) they bestowed praise upon him, for the energy and ability with which he had carried it out, during a great part of the period for which it was proclaimed; nor did they indicat any doubt that it was *lawfully in force* during the *whole* period, but only (*c*) as to whether it was properly carried out during the latter part.

The whole tenor of their *general* comments upon the measures taken in the suppression of the rebellion, that is, mainly the measures taken under martial law, and the very observations they made upon their necessarily terrible character, and the importance of the question of its con-

the overthrow of constituted authority was confined to a small portion of the parish of St. Thomas-in-the-East, yet that the disorder in fact spread with singular rapidity over an extensive tract of country, and that such was the state of excitement prevailing in other parts of the island that, had more than a momentary success been obtained by the insurgents, their ultimate overthrow would have been attended with a still more fearful loss of life and property."

(*a*) *Vide ante*, p. 304.

(*b*) "That praise is due to Governor Eyre for the skill, promptitude, and vigour which he manifested during the early stages of the insurrection; to the exercise of which qualities its speedy termination is in a great degree to be attributed. That the military and naval operations appear to us to have been prompt and judicious."

(*c*) "That by the continuance of martial law in its full force, to the extreme limit of its statutory operation, the people were deprived, for a longer than the necessary period, of the great constitutional privileges by which the security of life and property is provided for." They added their opinion that the punishments inflicted were excessive. But, as already observed, the reprobation of excess implied *legality*.

tinuance, implied a recognition of their legality, and a consciousness that martial law had the effect which has been here explained (*a*).

And, in considering the question of the duration of martial law, whether it had been retained too long, or carried out too severely, they justly observed (*b*), how much easier

(*a*) "We have now narrated the means used for the suppression of the insurrection, and have commented on the conduct of some of those engaged in the suppression. The number of persons concerned in the original outbreak, and in the deeds of violence by which it was accompanied and followed, was undoubtedly large; the number also of those who availed themselves of a time of disorder to plunder their neighbours was far larger; but the punishments inflicted seem to us to have been far greater than the necessity required. Nor can we shut our eyes to the fact that, among the sufferers during the existence of martial law, there were many who were neither directly or indirectly parties to the disturbances which it was the object of those placed in authority to suppress. We fear that this, to a certain extent, must ever be the case when the ordinary laws, framed for the suppression of wrong-doing, and the protection of the well-doer, are for a time suspended. The circumstances which are supposed to render necessary their suspension, are almost sure to be such as to excite both fear and passion; and some injustice, and we fear some cruelties, will be certain at such times to be perpetrated; but we think that much which is now lamented might have been avoided, if clear and precise instructions had been given for the regulation of the conduct of those engaged in the suppression, and every officer had been made to understand that he would be held responsible for the slightest departure from those instructions. It does not seem reasonable to send officers upon a very difficult, and perfectly novel service, without any instructions, and to leave everything to their judgment. But as, under any circumstances, however carefully instructions may be prepared, and however implicitly obeyed, the evils of martial law must be very great, we are driven to consider whether martial law might not have been terminated at an earlier period than the expiration of the thirty days allowed by the statute."

(*b*) "We know how much easier it is to decide this question after than before the event, and we are aware, too, that sometimes the success of the measures adopted for the prevention of an evil, deprive the authors of these measures of the evidence they would otherwise have had of their necessity. We have endeavoured, therefore, to place ourselves, as far as is possible, in the position of the Governor and his advisers, at the time their determination was arrived at. It was not till the 21st of October that the Maroons marched to Torrington, which evidently was the stronghold of the insurgents, and which place, from the marks of preparation found there, it had been intended to defend. After, however, firing a few shots, they fled at

it is to decide such questions *after* than before the event; and that sometimes the success of the measures adopted for the prevention of an evil, deprives the authors of those measures of the evidence they would otherwise have had of their necessity. And they candidly avowed that their object was to place themselves, as much as possible, in the position of the Governor *at the time.*

Indeed, the Commissioners were so sensible of the difficult elements of judgment involved in the question of the continuance of martial law, that they carefully abstained from expressing their opinion that it had been continued too long in legal existence, and cautiously confined themselves to the expression of an opinion that, during the latter part of the period of its continuance, it ought not to have been carried out fully in all its severity; and this plainly implied the legality of the measures taken under martial law (*a*).

the approach of the Maroons; and on the following Monday, the 23rd, Paul Bogle was apprehended, with his few remaining followers, and on the 24th was conveyed as a prisoner to Morant Bay. From this time it must have been clear to all that the rising in St. Thomas-in-the-East was put down, and that the only thing to be feared was simultaneous risings in other parts of the island. The question to be considered, in deciding upon the conduct of the Government, is not whether such risings were in fact likely to take place, but whether the Government, with the information then in their hands, had reasonable grounds for apprehending they might take place. It will be seen that they were receiving almost daily reports from different parts of the island, which must have led them to the conclusion that considerable danger of such risings existed. They could not at the time investigate, as we have, the grounds on which those reports rested. They were forwarded by the custodes of different parishes, in whom the Government was bound to place a certain amount of confidence, and they would have incurred a serious responsibility if, with this information before them, they had thrown away the advantage of the terror which the very name of martial law is calculated to create, in a population such as that which exists in this island."

(*a*) "But there was a course which might have been pursued by which that advantage would have been secured, and yet many of the evils ordinarily attendant upon martial law avoided. On the 30th of October it was formally stated by the Governor, that the wicked rebellion lately existing in certain parts of the county of Surry, had been subdued, and that the chief instigators thereof and actors therein had been visited

With regard to the measures taken under martial law for the suppression of the rebellion, the Commissioners considered them, as they have been considered in these pages, under two main heads, of military measures in the field, and of measures which may be deemed deterrent, *i.e.*, executions of prisoners on summary enquiry or sentences of court-martial. And as to the former, they quoted, with approval, such orders as had been issued by the General in command or the Commander-in-Chief, although they were of opinion that more explicit orders might properly have been issued. They stated: "We think that much which is lamented, might have been avoided, if *clear and precise instructions* had been given for the regulation of the conduct of those engaged in the suppression. It does not seem reasonable to send officers upon a very difficult and perfectly novel service, without any instructions, and to leave everything to their judgment."

The Commissioners contented themselves with recounting the military movements and measures taken, and though they mentioned with reprobation one or two instances of excess by private soldiers without orders; they pronounced no censure upon *the officers*, and, on the contrary, concluded this part of their Report, by a distinct expression of general approval (*b*) of the military measures which had been taken in the suppression of the rebellion.

with the punishment due to their heinous offences, and that he was certified that the inhabitants of the districts lately in rebellion, were desirous to return to their allegiance. From this day, at any rate, there could have been no necessity for that promptitude in the execution of the law, which almost precluded a calm enquiry into each man's guilt or innocence. Directions might and ought to have been given that courts-martial should discontinue their sittings; and the prisoners in custody should then have been handed over for trial by the ordinary tribunals." This necessarily implies that martial law, in its full force, *did* deprive them of these privileges, or, in other words, that the trials by courts-martial were legal.

(*a*) *Vide* p. 39. As to the orders (*vide ante*).

(*b*) "It appears to us that the strategical positions taken up, the detachments posted in the disturbed districts and in the island generally, and the active co-operation of the naval force, produced a *most beneficial effect*, and

In commenting upon the measures taken under martial law, for the suppression of the rebellion, no censure was passed upon any officer. The Commissioners directed their observations most particularly to the executions of prisoners, either on summary enquiry or on sentence of court-martial (*a*), and their comments plainly implied, that they deemed that death might lawfully be inflicted upon prisoners taken under martial law, upon proper enquiry and proof of complicity in the rebellion.

The Commissioners (*b*) specially adverted to the evidence

by the prompt and rapid manner in which the different movements were executed, the outbreak was overcome in a very short period (p. 25)." The *outbreak* was overcome, not the *rebellion*, still less the state or spirit of rebellion, out of which the rebellion and its "outbreak" arose, and which it was the object of martial law to subdue. There was some subsequent confusion of these two very distinct matters.

(*a*) "We carefully examined into every case in which it was alleged that a life had been taken. Comment has already been made on cases of destruction of life, which happened under exceptional circumstances. The conduct of the black soldier, on the road between Manchioneal and Port Antonio, caused the death of ten persons, without any enquiry or proof of guilt. The excuse of dread of the soldier, made by those who witnessed his acts and might have interfered, cannot be allowed. In none of the cases where deaths occurred from shots fired on the march, except in the march upon Torrington, does it appear that any actual resistance was offered to the advance of the troops."

(*b*) "It will doubtless be observed, that a great deal of evidence laid before us, with a view of proving the use of undue severity during the existence of martial law, has reference to the conduct of Mr. Gordon Ramsay, the Provost Marshal. As he is now about to take his trial on a charge of wilful murder, for an act done by him while he filled that office, it was not thought right by any of the parties concerned in the enquiry, that he should be asked any questions, the answers to which, or a refusal to answer which, might prejudice him on his trial. It will be obvious that, for the same reason, it would not be right for us to make any remarks upon his conduct. It is due to those under whom Mr. Ramsay acted, to state that no complaints of the cruelties now charged against him, although stated to have been witnessed by many, were made to those who placed him in authority, and had the power, and undoubtedly would have had the will, to deprive him of that authority, if such cruelties had been shown to have been committed. Further, we cannot help noticing the conduct of a magistrate, who states that he witnessed, what, in his opinion at the time, appeared to be an act of murder, without giving any intimation respecting

laid before them as to the conduct of the Provost Marshal, and plainly indicated their opinion that the charges against them were not very reliable, not having been made at the time, while they also quoted with approval the instructions (*a*) issued to him by the General in command, defining his duties.

The Commissioners entered fully into the trials by courts-martial, and the tenor of their comments thereon plainly implied the legality of such trials; for they entered into the propriety of the proceedings, with reference to sufficiency of proof, the fairness of the trial, and the degree of the punishments inflicted, all of which would be quite irrelevant if the trials were illegal (*b*). And upon the whole, they distinctly *approved* of the proceedings; thus affirming not only their *legality*, but their *propriety*.

it. He states that he was prevented by fear; but this did not prevent his making a formal complaint against Mr. Gordon Ramsay, when a comparatively trifling act of injustice was committed against himself; and it seems that he consented not to press his complaint in order that the public might not lose the services of Mr. Ramsay." (*Vide ante*, p. 375.)

(*a*) Brigadier-General Nelson, upon being made acquainted with the conduct of Mr. Ramsay towards this magistrate, sent the following reprimand:—"Having given Mr. Marshalleck's complaint and the Provost Marshal's explanation my grave and serious consideration, it is my duty to inform the Provost Marshal, that in every way connected with the case he has exceeded his powers, and adopted a course I must strongly reprehend. Briefly, the Provost Marshal, in acting as he did, is open to very severe censure, much of which I withhold in consequence of the good service he has done, and because I hope that this error in dealing with Mr. Marshalleck was the result of over-zeal. I peremptorily forbid any summary punishment being inflicted within the camp henceforth; and all cases of a serious nature are to be referred for my decision, or that of my aide-de-camp, to whom alone I shall delegate the authority to dispose of such." This is evidently approved of. (*Vide ante*, p. 205.)

(*b*) "The number of executions by order of courts-martial appeared to us so large, that it became very important to ascertain, as far as we were able, the principles upon which the members constituting the courts acted, and the sort of evidence upon which their decisions were pronounced. It would be unreasonable to expect that in the circumstances under which these courts were assembled, there should be the same perfect regularity and adherence to technical rules which we are accustomed to witness in our ordinary tribunals; but there are certain great principles

Some of their comments, indeed, upon particular cases, perhaps (*a*), might be deemed to savour rather more of the strictness of English criminal procedure, than the substance

which ought under no circumstances to be violated, and there is an amount of evidence which every tribunal should require before it pronounces a jungment which shall affect the life, liberty, or person of any human being. In order to ascertain whether these principles have been adhered to, and whether in all cases this necessary evidence has been required, we have carefully read the notes of the evidence given before the different courts, upon which notes the confirmations of the sentences were pronounced. In the great majority of the cases the evidence seems to have been unobjectionable in character, and quite sufficient to justify the finding of the court. It is right also to state that the account given by the more trustworthy witnesses as to the manner and deportment of the members of the courts was decidedly favourable. But we think it right also to call attention to cases in which either the finding or the sentence was not justified by any evidence appearing on the face of the proceedings.

(*a*) "In the case of Samuel Clarke, George M'Intosh, and William Grant, in all of which the notes of the proceedings will be found fully set out in appendix, and in each of which cases also some witnesses were examined before ourselves, the evidence appears to us to have been wholly insufficient to justify the findings." It, however, would be entirely for the courts-martial to judge of the weight of the evidence. "It appears also from the proceedings that one person was executed upon proof that he was advising the rioters on the 7th of October how to act, and that he resisted the police and assisted in handcuffing them on the 10th. Another, on proof that he had resisted the police on the 10th, having in his hand a cutlass and big stick, and that he made use of the following expression:—'You were taking my name down on Saturday; now I can take my revenge. If we did not consider one thing, we would take your head off.' But if there was a rebellion, this was undoubtedly the outbreak (*vide ante*, p. 122); and these men clearly were parties to it. "Three persons were convicted and executed upon the production and proof of affidavits made behind their backs by persons, who, for anything that appears to the contrary, might perfectly well have given their evidence in open court." As to this, however (*vide ante*, p. 406). "At Port Antonio, the evidence allowed to be be given was of a most objectionable description. William Troop gave evidence against William Mitchell of a confession made by the latter of his having assisted in the murder of Mr. Hire, and immediately afterwards was himself put upon his trial as an accessory to the same murder, and was convicted, upon the evidence of Mitchell, of a confession made to him, coupled with the affidavit of a person whose absence was not accounted for." As to this again (*vide ante*, p. 406). "Three persons were convicted and two were executed upon the evidence of a confession made by a man shortly before his execution, in which he stated that the prisoners had assisted in

of natural justice; which is all that could be obligatory upon such tribunals as courts-martial under martial law. And the Commissioners did not indicate any idea that the matters they disapproved, as not according to the *better* mode of procedure, went to the *substance* of justice.

The comments of the Commissioners, indeed, under this head—doubtless to be ascribed to the influence of the *legal* members of the Commission (*a*)—and, no doubt, natural enough, as coming from criminal lawyers, accustomed to that strictness, in *favour of the accused*, which even our own judges (*b*) sometimes regard as rather a defect of our criminal procedure—plainly implied the legality of the trials.

Even in adverting to that class of cases (*c*), in which the

the murder for which he himself was about to suffer. Five persons were convicted on the unconfirmed testimony of a man himself just convicted and sentenced to death as a spy, and for having incited others to join in the rebellion, one of the persons so convicted having himself given evidence to prove the case against the spy." The Commissioners, however, did not suggest that these executions were legally wrong. By our common law, a person on whose testimony another has been convicted, may himself be convicted and executed on the evidence, either of that person, or any one else. (*Vide* R. *v.* Rudd; Cowper's rep.)

(*a*) *Vide ante*, p. 419. "At Manchioneal, also, affidavits were regularly received as proof of the facts deposed to, and in some cases in which death was the sentence the affidavits constituted the only evidence." (*Sed vide ante*, p. 406.) "At Up-Park Camp the trials seem to have been conducted with great regularity, and there were only three in which capital punishment was inflicted. But, in one of these cases, the *only* offence charged or proved was the use of the following expression by a convict, in one of the cells of the Kingston gaol:—'I have seen too much gun. Creoles are fools. If it (meaning the present rebellion) had been in Africa, we would have known what to do immediately. If I had but five of my countrymen, I would make you see something. If I had a sword, I would kill Mr. Shaw and Mr. Horton. The black men *ought to rise like St. Domingo, to take Jamaica from the buckras.*' The above observations are founded exclusively on the proceedings themselves, which were submitted for confirmation to the Commanding officer, and on which it would appear that his confirmation of the sentence was founded."

(*b*) *R.* v. *Suddis*, 1 East's rep. 316. *Vide ante*, p. 379.

(*c*) *Vide ante*, p. 406.

prisoners had been sentenced by courts-martial, to terms of imprisonment or penal servitude, which might be remitted, if illegal, and from which, in point of fact, they had been released, the Commissioners (*a*) cautiously abstained from declaring that the trials and sentences were illegal, and put the release of the prisoners upon another ground, not indeed intelligible, but certainly not that of illegality.

And, although there was a passage (*b*) in the Report, which seemed to imply that some of the sentences were illegal, it was left uncertain whether this might not mean that they were so on account of their *excessiveness*; and, at all events, if it implied that the trials and sentences were necessarily illegal, then the passage was logically inconsistent with the whole tenor of the Report, and would be utterly at variance with judicial authority (*c*).

(*a*) "Upwards of 100 of those who were flogged were sentenced also to different terms of imprisonment, varying from six months to twelve years. As, however, from the time of the expiration of martial law *there was no power to enforce these sentences*, the persons so sentenced have been released." The Commissioners not only did not say that the trials or sentences in these cases were illegal, or that the sentences were *remitted* on that ground, but imply the contrary, that the sentences were *legal*, and that the prisoners were *released*, "because, after the expiration of martial law, there was no power to enforce the sentences." What that means is not intelligible. It would be logical to say that the sentences were illegal; but then, if so, all the trials and sentences were equally illegal, whereas the Commissioners plainly implied the contrary.

(*b*) Thus, in a subsequent part of the Report there was the following:—"In other cases the sentences seem wholly disproportioned to the offence charged. The illegality, however, of these sentences has happily prevented them from being carried out to their full extent. One man was sentenced to fifty lashes, and three years' imprisonment, for travelling without a pass, and not giving a satisfactory account of himself; another to fifty lashes, and five years' imprisonment, upon proof that, in addition to not giving a satisfactory account of himself, he confessed 'that he was coming from the residence of the late rebel, George William Gordon.'"

(*c*) Because, as already shown (*vide ante*, p. 379), when a court-martial sits abroad, with a discretionary authority (as is the case under martial law), it has been distinctly held that it *has* authority to sentence a prisoner to a long term of penal servitude, even in a case in which such a sentence cannot be imposed by the law of England. (*R.* v. *Suddis*, 1 East's rep.)

The Commissioners entered fully into the leading case of Gordon, who was arrested out of the proclaimed district (a), taken into it, and tried, convicted, and executed for complicity in the rebellion. But they did not question the legality of the proceeding; and, by stating the facts of his

If, therefore, the courts had any authority at all, they had authority to pass such sentences. (*Vide ante*, pp. 385, 388.)

(a) Thus, after stating his arrest, on the 17th October, at Kingston, they went on to state:—"From Kingston he was sent by sea to Morant Bay, where he was put on shore a prisoner on Friday evening, the 20th October. The next day a court-martial was sitting for trial of prisoners there, consisting partly of members of the Legislature. Brigadier-General Nelson, however, having deemed it right that Mr. Gordon should not be tried by a court composed of persons who might be supposed to be influenced by local prejudices, adjourned that court, and another was convened, before which, about two o'clock the same afternoon, Mr. Gordon was brought for trial. The charges against the prisoner were for furthering the massacre at Morant Bay, and at divers periods previously inciting and advising with certain insurgents, and thereby, by his influence, tending to cause the riot. Two heads of offence were drawn up, one for high treason, the other for complicity with certain parties engaged in the rebellion, riot, and insurrection at Morant Bay. One witness has stated that more than once during this trial, at the opening and during its progress, Mr. Gordon made application to postpone the trial, on the ground of want of jurisdiction of the court to try him, and also on account of the absence of material witnesses for the defence. The witness, however, who deposes to this seemed wholly unworthy of credit. Neither the person who independently reported the trial for publication at the time, nor the documents of the court recording the proceedings and particulars of the trial itself, make any mention of such an application, one of such importance as could hardly have escaped notice. Other persons present at the trial, who heard all that passed there, deny that any such application was made. After the case against the prisoner had closed, Mr. Gordon inquired for Dr. Major, who, he said, could prove that the state of his health had prevented him from attending the vestry meeting at Morant Bay on the 11th October. The Provost Marshal was sent from the court to look for the doctor, and, on returning shortly afterwards, said to Mr. Gordon, "Dr. Major is not in the bay." The witness Theodore Testard was then called by Mr. Gordon to prove the same fact, but he had no knowledge on the subject. But he stated that Gordon did not appear to be ill. Considering the importance then attached to Mr. Gordon's absence from the vestry on the 11th of October, it would have been much more satisfactory if some delay had been allowed, in order that Dr. Major might have been sent for to speak to the state of his health on that day." (*Vide ante*, p. 404.)

arrest and trial without comment, and entering into the propriety of the trial, they appeared to imply its *legality*.

In setting out the evidence (*a*), in substance, as already stated, the Commissioners said not a word against the fairness of the trial; they merely stated that part of the evidence consisted of depositions of persons, whose depositions would not have been admissible on a trial at law or on a regular court-martial; and, without saying that there was no evidence which could justify the court in its finding, they only added the expression of their own opinion, that the *express* evidence in the case appeared *to them* insufficient to establish "the charge" (*b*); a mere expression

(*a*) "The evidence taken consisted of documents and oral testimony. Some of these documents were selected from the papers of Mr. Gordon by Brigadier-General Nelson, and others were statements of persons taken and sworn before magistrates, and then forwarded to Mr. Ramsay, the Provost Marshal. All these were laid before the court by the Provost Marshal. They consisted of (*vide ante*, p. 399) William Robertson Peart, James Fyfe Humber, &c., whose joint statement was read, deposing to the matter spoken by Mr. Gordon at the Vere meeting in September. Both of these persons were in Jamaica at the time of the trial, and might have been summoned to give oral testimony. Charles Chevannes and George Thomas might also have been called as witnesses, as they were living in Jamaica." But G. Thomas was ill in a hospital, (*vide ante*, p. 280). "The written statements of these four persons had been taken in the absence of Mr. Gordon, and were inadmissible as proofs against him according to the rules that regulate evidence in English courts, either civil or military" (that is, regular courts-martial or common law trials). "With regard to the written statements of J. Anderson, James Gordon, and Elizabeth Jane Gough, they were not legal evidence, but those persons were sworn and examined at the same trial. The printed placard headed "State of the Island," is a duplicate of that above-mentioned as posted up on a tree in August at Morant Bay, the original draft of which was proved to have been in the handwriting of Mr. G. W. Gordon. Five witnesses were sworn and examined for the prosecution, and one on behalf of the prisoner. The evidence, oral and documentary, appears to us to be wholly insufficient to establish the charge upon which the prisoner took his trial." (*Sed vide ante*, p. 399.)

(*b*) "The evidence *oral and documentary*." Yet these eminent lawyers, of course, were fully aware this was *not the whole evidence* in the case before the court-martial, but that they might lawfully *interpret and apply* the express evidence by the light of general facts of a *notorious* character, and might draw inferences of fact from the *whole* of the evidence, *i.e.*, from the express evidence thus interpreted and applied (*vide ante*, p. 402). That

as to the weight and effect of the evidence, which was legally for the court-martial, and plainly implying (in the absence of any suggestion to the contrary), the entire legality of the trial; and not implying, necessarily, any degree even of unfairness, or impropriety.

And not only so, but it appeared from the remarks (*a*)

they should thus cautiously limit themselves to the express evidence, and to the mere expression of their own opinion upon its sufficiency, was as significant, as their carefully abstaining from saying on *which* of the three charges *included* in the indictment, treason, sedition, and incitement to murder, the evidence was wholly insufficient. As to treason, it was so (*vide ante*, p. 191). But they did not, and could not, distinctly say that there was not sufficient evidence of incitement to sedition or massacre. Witnesses distinctly swore that the prisoner *did* incite to massacre.

(*a*) Upon a careful review of this evidence, we have formed the opinion that the true explanation of Mr. Gordon's conduct is to be found in the account which he has given of himself. "I have just gone as far as I can go, and no further. If I wanted a rebellion I could have had one long ago. I have been asked several times to head a rebellion, but there is no fear of that. I will try first a demonstration of it," &c., &c. Mr. Gordon might know well the distinction between a "rebellion" and a "demonstration of it." He might be able to trust himself to go as far as he could with safety, and no further. But that would not be so easy to his ignorant and fanatical followers. They would find it very difficult to restrain themselves from rebellion when making a demonstration of it. If a man like Paul Bogle was in the habit of hearing such expressions as those contained in Gordon's letters, as that the reign of their oppressors would be short, and that the Lord was about to destroy them, it would not take much to convince him that he might be the appointed instrument in the Lord's hand for effecting that end; and it is clear that this was Bogle's belief, as we find that after the part he had taken in the massacre at Morant Bay, he, in his chapel at Stoney Gut, returned thanks to God that "he had gone to do that work, and that God had prospered him in his work." It is clear, too, that the conduct of Gordon had been such as to convince both friends and enemies of his being a party to the rising. We learn from Mr. Gordon himself that in Kingston, where he carried on business, this was the general belief as soon as the news of the outbreak was received. But it was fully believed also by those engaged in the outbreak. Bogle did not hesitate to speak of himself as acting in concert with him. When Dr. Major was dragged out of his hiding place on the night of the 11th of October, he saved himself by explaining that Mr. Gordon "would not wish to have him injured," and when Mr. Jackson made a similar appeal for his own life, to the murderers of Mr. Eyre, it appears to have been equally successful. The effect which was likely to follow the meetings, which took place during the spring and summer of 1865, in some of which Mr. Gordon took a

made by the Commissioners, upon the evidence taken before themselves as to the case, and which conclusively showed that the prisoner had, in fact, incited to sedition, that the Commissioners had all along in their minds an impression that the charge necessarily involved complicity, either in the particular massacre, or in a *general conspiracy* against the Government.

So that it would be quite consistent with their opinion upon the case, that the prisoner was properly as well as legally convicted of inciting to sedition or rebellion, which would be capital by martial law. And the Commissioners (*a*), while

part, was foreseen by one of his most ardent supporters, who, writing to a common friend on the subject of an article he had inserted in the newspaper, respecting the Vere meeting, used these words: "All I desire is to shield you from the charge of anarchy and tumult, which in a short time must follow these fearful demonstrations." Although, therefore, it appears exceedingly probable that Mr. Gordon, by his words and writings, produced a material effect on the minds of Bogle and his followers, and did much to produce that state of excitement and discontent in different parts of the island, which rendered the spread of the rebellion exceedingly probable, yet we cannot see, in the evidence which has been adduced, any sufficient proof either of his complicity in the outbreak at Morant Bay, or of his having been a party to a general conspiracy against the Government.

(*a*) "On the assumption that, if there was in fact a widespread conspiracy, Mr. G. W. Gordon must have been a party to it, the conclusion at which we have arrived in his case is decisive, as to the non-existence of such a conspiracy. The only evidence, beyond that of vague rumours, in any degree tending to show an intended rising at some future time, was given by one witness, who deposed to a statement made by an insurgent engaged in attacking a property in the neighbourhood of Bath, that "it was not their time; that Christmas was their time, and they were preparing for it, but as it had come on so soon they must go on and smash down everything, and kill all the white and brown." The Commissioners, however, must have been speaking of a settled design for a rising at some specific time, which would be very immaterial, if there was a general disposition to rise at *any* time, as to which the evidence was overwhelming. "We think, however, that various meetings had been held in the course of the summer, at which speeches were made, tending to cause excitement and discontent. The effect of these speeches was the greater from being addressed to an ill-educated and impulsive people. Upon this point also the evidence of Mr. Fyfe, a stipendiary magistrate long resident in the island, is deserving of attention. He speaks of an opinion which he formed and communicated at the time to the Government. He says: "There was a general excite-

negativing the fact of a general conspiracy or actual organization *throughout* the island, of *which alone* they acquitted Gordon, declared that there had been meetings, to which he had notoriously been party, by which, in fact, the negroes had been incited to rise in insurrection; and this of itself amply sustained the conviction.

In the summary (*a*) given by the Commissioners of the military punishments inflicted,—although, as already mentioned, all of them would have been illegal, unless under martial law, they did not in the least indicate that any of them were illegal, and the censures they pronounced in

ment that led me to think there would be a disturbance, and I wrote to Mr. Hosack to that effect, after the meeting in Vere, to say that I thought the law officers of the Crown ought to interfere; that things were going too far—that is, the meetings held by Mr. Gordon; that we had no police, and that a conspiracy might be hatched next door to our police station without our knowing anything about it."

(*a*) "The total number of deaths caused by those engaged in the suppression amounted to 439, and the total number of dwellings burned to 1000. With respect to the number of persons who were flogged, it is impossible to state it with any degree of accuracy. Sixty appear to have been flogged by order of courts-martial; one woman was sentenced to be flogged at Morant Bay, but Colonel Nelson refused to confirm the sentence. The number flogged without a court-martial was much larger. Seventy-three were thus flogged at Port Antonio, forty-four at Up Park Camp, &c., and considerably above one hundred at Morant Bay. A still larger number were flogged at Bath. Nearly fifty were flogged on one day, of whom twenty were women. This did not, however, continue long, as Colonel Fyfe, who arrived a very few days after the floggings commenced, gave positive orders for the discontinuance of the practice. The whole number subjected to this degrading punishment during the continuance of martial law, we think could not have been less than six hundred. The mode of inflicting the punishment at Bath calls for special notice. It was ordered by a local magistrate, after a very slight investigation, and frequently at the instance of book-keepers and others, smarting under the sense of recent injury." The twisting of wire with the ropes was then mentioned with reprobation, and it was of these floggings (which, it will be observed, were unauthorized by the officers), the Commissioners reported that, they were "barbarous." As regards the numbers flogged, however, they omitted all estimate of the numbers of those actually engaged in the rebellion, and which could hardly have been less than 4000 or 5000 (*vide ante*, p. 286)

particular instances or classes of cases, implied the general legality of the measures thus taken under martial law.

Although the Commissioners concluded (*a*) such a general statement of their opinion, that the punishments inflicted were too numerous, they gave no ground or reason for that opinion, nor laid down any rules or principles upon which they had arrived at the conclusion, nor by a regard to which, officers on any future occasion, might avoid any similar excess, nor did they refer to any evidence, to support their general opinion.

The Secretary of State (*b*), in his despatch to the Lieu-

(*a*) "Lastly, that the punishments inflicted were excessive, and that the punishment of death was unnecessarily frequent. 2. That the floggings were excessive. 3. That the burning of 1000 houses was wanton and cruel." They gave no instances in illustration of these heads of excess, except alluding to a few floggings of women, and some cases of floggings with wire-ropes, and an instance of ten men shot by a black soldier. With these exceptions, they referred to no evidence in support of any of these statements, nor gave the grounds or reasons for any one of them, nor any rule or principle on which they had arrived at the conclusion, that the number of deaths or of floggings had been excessive (*et vide ante*, p. 413).

(*b*) Despatch of Mr. Secretary Cardwell, June 18:—"In the conclusions at which you have arrived her Majesty's Government generally concur. Though the original design for the overthrow of constituted authority was confined to a small portion of the parish of St. Thomas-in-the-East, yet there can now be no doubt that the disturbances there had their origin in a planned resistance to that authority. It is further evident, looking to the singular rapidity with which disorder spread over an extensive tract of country, and to the state of excitement prevailing in other parts of the island, that the ultimate defeat of the insurgents would have been attended with a still more fearful loss of life and property had they been permitted to obtain a more than momentary success. Under these circumstances, Governor Eyre fully deserves all the commendation which you have bestowed upon the skill, promptitude, and vigour which he manifested during the early stages of the insurrection, to the exercise of which qualities on his part you justly attribute in a great degree its speedy termination. As regards the proclamation of martial law under the Island Act of 1844, her Majesty's Government agree with you that the Council of War had good reason for the advice which they gave, and the Governor was well justified in acting upon that advice. Her Majesty's Government agree in your conclusion that the military and naval operations were prompt and judicious; and considering the large share personally taken by Governor Eyre in the direction of those operations, they attribute to him a large share also of the

tenant-Governor, the Chief Commissioner, declared his entire concurrence in these conclusions, and in the first place distinctly declared his concurrence in the conclusion, that there had been a rebellion, which fully justified the declaration of martial law, and the acting upon it for some period; that is, as necessarily implied (*a*), in the sense in which it has been expounded in these pages; in which alone with insignificant exceptions, the measures taken could possibly have been legal.

And while, on the other hand (*b*), adverting to some matters in which he had come, with the Commissioners, to a conclusion contrary to the judgment which the Governor had formed, he was careful likewise to express his concurrence in their just and candid observation, that it is comparatively easy to decide such questions *after the event*, and that the very success of the measures taken would remove the evidence of this necessity, which might otherwise have existed. And he was likewise careful to convey (*c*) his concurrence with the judgment of the Commis-

credit which is due for their success. The addresses of the Legislative Council, of the House of Assembly, of the various parishes of the island, and of others, testify the sense generally entertained by the white and coloured inhabitants of their obligation to Governor Eyre for the promptitude and vigour of those measures.

(*a*) *Vide ante*, p. 305.

(*b*) "On the other hand, however, it must be borne in mind that martial law, and the execution of capital sentences under martial law, continued for the full period of a month authorised by the statute, although after the few first days of the insurrection no serious outrages were committed by the insurgents, nor was any resistance offered to the troops. As early as the 27th October, Governor Eyre wrote to me that on the 20th he had left Morant Bay, satisfied that the rebellion was got under; and on the 30th, a fortnight before the actual expiration of martial law, it was formally stated in the proclamation of amnesty that the wicked rebellion lately existing in certain parts of the county of Surry had been subdued; that the chief instigators thereof, and actors therein, had been visited with the punishment due to their heinous offences; and that the Governor was certified that the inhabitants of the district lately in rebellion were desirous to return to their allegiance."

(*c*) "You have justly observed how much easier it is to decide such ques-

sioners, in precisely the same guarded and limited terms in which they had conveyed it; terms plainly implying entire legality, because limited to considerations of propriety; and pointing only to the propriety of limiting the operation of martial law, during the latter part of the period of its continuance.

And the Secretary of State was careful to recapitulate (*a*) the grounds upon which the Governor had vindicated

tions after than before the event, and that sometimes the success of the measures adopted for the prevention of an evil deprives the authors of those measures of the evidence they would otherwise have had of their necessity. Yet, upon a full review of all the circumstances of the case, her Majesty's Government cannot but agree with the conclusion of your report, "that by the continuance of martial law in its full force to the extreme limit of its statutory operation, the people were deprived for longer than the necessary period of the great constitutional privileges by which the security of life and property is provided for." They also agree with you that, if not from the date of the apprehension and execution of Bogle, at least from the time at which the reinforcements from Nassau and Barbadoes had arrived, and the amnesty was proclaimed, "there could have been no necessity for that promptitude in the execution of the law which almost precluded a calm inquiry into each man's guilt or innocence;" and that "directions might and ought to have been given, that courts-martial should discontinue their sittings. The prisoners in custody might well have been handed over for trial by the ordinary tribunals."

(*a*) "Despatch of Mr. Secretary Cardwell, 18th June, 1860, Parl. Pap.:—That I may do full justice to the reasons which induced him to consider desirable the continuance of martial law, I will transcribe them in his own words. In answer to your question, No. 46,634, he says:—'I now give the reasons which induced me to think that martial law should be continued. They are very short:—1. In order to deal summarily with the cases excepted from the operation of the amnesty, many of the parties being as guilty as those tried by courts-martial previous to the amnesty, and there being no valid reason why they should not be dealt with in the same manner. 2. To preserve peace and good order in the districts where the rebellion had existed, and to afford time to reorganise the civil institutions. The custos, the magistrates, the clergy, and other principal inhabitants had been killed, wounded, or driven away. The inspector of police had been killed, and the force become disorganised and demoralised. The court-house itself was burnt to the ground. It was impossible to re-establish civil institutions and relations at such a juncture, or with a sufficient time being allowed for reconstruction and for the return of magistrates, clergy, and other inhabitants who were compelled to fly during the rebellion. I think that is one very important reason why it was impossible to have

the continuance of martial law, and which it is desirable to bear in mind, because involving obviously, as the Secretary of State acknowledged, matters of judgment, on which different minds might take different views.

And in expressing his concurrence in the opinion of the Commissioners, that martial law had been carried out too long, and too severely, the Secretary of State (*a*) with

suspended martial law.' And in answer to your next question, 46,635,—'What, in your opinion, would have been the evils that would have arisen from taking that particular course on the 30th of October?' he proceeds:—'3rdly. It was important that for some short time longer at least the Government should continue martial law, to operate as an example and a warning *in terrorem* over the disaffected of other districts, without the necessity of imposing it in those districts. 4thly. The indication which the continuance of martial law in the county of Surry for some days after the amnesty gave of the determination of the Government to deal promptly and decisively with persons guilty of rebellion, or the concomitant crimes of murder and arson, was the most efficacious step it could take to overawe the evil-disposed in other parts of the colony, and thereby prevent any rising amongst the negro population of the districts where disaffection and seditious tendencies were known to exist.' Those were the four principal reasons which operated with the Government at the time."

(*a*) "It remains, at present, to consider the conclusions at which have arrived with respect to the continuance of martial law in its full force, to the extreme limit of its statutory operation, and to the excessive nature of the punishments inflicted. In reviewing this painful portion of the case, the greatest consideration is due to a Governor placed in the circumstances in which Governor Eyre was placed. The suddenness of the insurrection; the uncertainty of its possible extent; its avowed character as a contest of colour; the atrocities committed at its first outbreak; the great disparity in numbers between the white and the black populations; the real dangers and the vague alarms by which he was on every side surrounded; the inadequacy of the force at his command to secure superiority in every district; the exaggerated statements which reached him continually from distant parts of the island; the vicinity of Hayti, and the fact that a civil war was at the time going on in that country;—all these circumstances tended to impress his mind with a conviction that the worst consequences were to be apprehended from the slightest appearance of indecision. Nor must it be forgotten that he resisted the proposal urgently made to him by the custos and the magistrates to proclaim Kingston, that he refused to accede to the suggestion of Colonel Whitfield to proclaim the parishes of Trelawney, St. James', Hanover, and Westmoreland; or to that of Major General O'Connor, who thought that from the first the whole island ought to have been placed under martial law; and that in respect both to the

great sense and candour, made large allowances for the dangerous nature of the rebellion; its avowed character, as one of race and colour, the disparity of the two classes of the population, the deficiency of military force, and the other circumstances on which the Governor had grounded the necessity for martial law.

And in the passage (*a*) in which the Secretary of State conveyed his concurrence in the judgment of the Commanders on this head, he was careful to recognize the value of terror, as one of the elements of martial law, and of deterrent measures, such as court-martial and infliction of summary punishment, as a means of keeping up that terror, while at the same time he pointed out that punishment was not the *object* but the *means*, and that these measures were only to be resorted to so long as such deterrent

assistance offered by the Governor of Cuba and to the summoning of British troops from Halifax, Nova Scotia, he showed himself superior to feelings of alarm expressed and entertained by those around him."

(*a*) "It may, indeed, be admitted that, as you have said, the Government would have incurred a serious responsibility, if, with the information before them, they had thrown away the advantage of the terror which the very name of martial law was calculated to inspire; but it appears from the summary of the sentences by courts-martial appended to your report, that the numbers executed must have included many who were neither ringleaders of the insurrection nor participators in actual murder or outrage of the like atrocity; while for the wholesale flogging and burning of houses, the circumstances of the case do not appear to furnish any justification. Future good government is not the object of martial law. Example and punishments are not its objects: its severities can only be justified when and so far as they are absolutely necessary for the immediate re-establishment of the public safety. Her Majesty's Government have learnt rather with regret than with surprise, as the result of your careful examination of the proceedings, that while in the great majority of the cases the evidence seems to have been unobjectionable in character, and quite sufficient to justify the finding of the court, and the account given by the more trustworthy witnesses as to the manner and deportment of the members of the courts was decidedly favourable, yet you have been compelled also to call attention to some cases in which either the finding or the sentence was not justified by any evidence appearing on the face of the proceedings; and to other cases, of which the evidence allowed to be given was of a most objectionable description; and again to others, in which the sentences seem to have been wholly disproportioned to the offences charged."

measures were really necessary to remove danger, and re-establish safety.

With reference to the excesses, the Secretary of State concurred in the view of the Commissioners, that too much had been left to the discretion of the officers (*a*), and that clear and precise instructions ought to have been issued to them, though of what particular nature he did not indicate; and he confined himself cautiously to the opinion of the Commissioners with regard to the responsibility of the Governor for the measures taken under martial law.

The Secretary of State (*b*) admitted that, as laid down in the previous portions of this work, strictly speaking, the primary responsibility for the measures taken under martial law would rest with the military authorities, and that their nature would only come generally under the notice of the Governor (*c*). But he expressed it

(*a*) "Her Majesty's Government have arrived at this conviction with the deepest concern. They are desirous of recognising every consideration which can extenuate the condemnation it necessarily involves. But their principal anxiety must be to prevent the recurrence in any future case of proceedings like those which they now deplore. It appears to them to be evident that, even in the first excitement of the disturbances, and still more at some later period, if martial law was allowed to continue, instructions ought to have been issued to the officers to whom the actual conduct of the operations was entrusted which would have rendered such an abuse of power impossible. They agree entirely in the words which you have adopted, &c. (quoting the words already cited).

(*b*) "I think it is due to Mr. Eyre that I should accompany this observation by the statement that, in the instructions to Colonial Governors, no reference is made to the possible occurrence of such an emergency as that in which he was placed. How far it may be possible to frame general instruction which might assist the Governor in the case of future disturbances arising in any colony, is a subject which will receive careful consideration at the hands of her Majesty's Government."

(*c*) "It appears that Mr. Eyre was only very generally informed of the measures actually taken. In his first despatches in reply to my enquiries, he said that whilst all the general arrangements for the suppression and punishment of the rebellion were made under his immediate direction, the subordinate details, and the internal management of the districts under martial law, including the appointment of courts-martial, the trial of

as his opinion, that it was the duty of a Governor, on such an occasion, to keep himself as well informed as possible of the measures taken, in order that he might be ready to exert the supreme authority of Government for the repression of any excesses.

With regard to the case of Gordon (*a*), tried and exe-

prisoners, the approval of sentences, and the carrying out of such sentences, rested entirely with the military authorities, were reported to the General in command, and only partially came under his own notice in a general manner; and in his despatch of April 5, he further says: "Having been personally present in the eastern district up to 20th October, and considering that one of the chief grounds stated for the appointment of a commission of enquiry was an allegation of excessive and unlawful severity, I think it right to mention that no such cases came under my own observation, nor were any brought to my notice, or any complaints made to me against the officers in command during the whole period of martial law;" and he then proceeds to relate instances in which abuse had subsequently come to his knowledge, and in which he had taken measures for punishment or for enquiry. With respect to the measures of severity to which I have above referred, you have not imputed, and Her Majesty's Government do not impute, to Mr. Eyre any personal cognizance, at the time, of those measures; but they feel strongly that, when a Governor has been compelled to proclaim martial law, it is his bounden duty to restrain within the narrowest possible limits the severities incident to that law, and, for that purpose, to keep himself constantly informed of what is taking place under it. In the first alarm of such a disturbance, it cannot be expected that it will be possible for him to restrain all persons, acting under martial law, within the bounds which his own discretion would prescribe; but if it were deemed necessary to continue martial law, it was the duty of the Governor to inform himself of the character of the proceedings taken, and to put an end to all proceedings which were not absolutely necessary, and, therefore justifiable on the ground of necessity. Her Majesty's Government cannot, therefore, hold the Governor of the colony irresponsible, either for the continuance or for the excessive severity of those measures."

(*a*) "In his first despatch Governor Eyre directed the especial attention of Her Majesty's Government to the case of Mr. Gordon, who had been arrested at Kingston, where martial law did not prevail, had been carried to Morant Bay, tried by court-martial at that place, condemned, and executed. To all the circumstances of this case you have given great attention, and have reported your opinion that 'the evidence, oral and documentary, appears to be wholly insufficient to establish the charge upon which the prisoner took his trial.' In this conclusion Her Majesty's Government concur. They have not forgotten that, while Governor Eyre at first exempted Kingston, on grounds of public policy, from the pro-

cuted as the real head and author of the rebellion, the Secretary of State, in terms exceedingly guarded and cautious, expressed his concurrence, in the very ambiguous conclusions of the Commissioners, abstaining, as carefully as they had done, from saying anything against the legality of the trial.

And, although the Secretary of State went on to declare (*a*) that the Government could not but deplore and

clamation of martial law, he had it in his power, and would have exercised that power, to issue a new proclamation, if he had thought it necessary to do so, before arresting Mr. Gordon. They have duly weighed the reasons which he has assigned for the course which he pursued, namely, 'that, considering it right in the abstract, and desirable as a matter of policy, that whilst the poor black men who had been misled were undergoing condign punishment, the chief instigator of all the evils should not go unpunished, he at once took upon himself the responsibility of the capture; and that, having seen the proceedings of the court, he concurred both in the justice of the sentence, and in the policy of carrying it into effect, regarding it as absolutely necessary for the future security of Jamaica, that condign punishment should be inflicted upon those through whose seditious acts and language the rebellion had originated. But it is evident that such considerations ought to be admitted with great hesitation. If lightly accepted, they would be liable to great abuse, and cases like the present, instead of being regarded as warnings, might become precedents for future action."

(*a*) "In the present case, not only has the necessity of the course adopted not been proved, but it appears from the evidence of Mr. Westmorland, one of the executive committee, that he suggested at the time that Mr. Gordon, who had been placed on board the Wolverine, should be reserved for trial by a regular tribunal, with all the means of defence which are secured by the ordinary process of law to every subject of the Queen. This, in the judgment of Her Majesty's Government, would have been the proper course. Considerations of public safety justified the arrest of Mr. Gordon. His removal on board the Wolverine would have been judicious; but his trial by court-martial, and his execution by virtue of the sentence of that court, are events which Her Majesty's Government cannot but deplore and condemn." No reason is stated here for this opinion, except a hasty, ill-considered suggestion by one member of the Council, which he himself did not adhere to, and which was negatived by the Executive Committee, when they approved of Gordon's execution. Moreover, the Commissioners in their Report (p. 87), distinctly stated that the Commander-in-Chief of the colony, as well as the General in command, and the Executive Committee, approved of the execution; and it was proved before the Commissioners, that to have put Gordon upon his trial before a jury would have been perfectly idle (*vide*

condemn the execution, this, it was obvious, was only upon what were deemed moral grounds; and mainly upon the supposed possibility of procuring a trial sufficiently prompt, fair, effectual, and deterrent, under ordinary law; assuming which, no doubt, there would be no necessity for a trial under *martial law.*

With reference to the immunity conveyed by the proclamation of martial law (*a*), as to all acts done in the pro-

Evidence of Walcott and Williams, *vide ante*, p. 393). And the Commissioners did not venture to say that the man was not legally convicted, nor that he was not *properly* convicted of a capital offence under martial law (*vide ante*, p. 435); and, they disclosed facts proving conclusively that the Governor and Council were right in believing him to have been the head of the rebellion, and to have been privy to the massacre. It is manifest that the view of the Secretary of State proceeded upon the assumption that a trial under ordinary law would have been sufficiently deterrent. But that, as already pointed out, involved the assumption that no trial at all was necessary *at the time*, and it was overlooked that acts of outrage, and even of armed encounter, continued up to the very day of the trial. Whether, however, the Secretary of State was right or wrong in his opinion, that was the ground of it. Moreover, the opinion of the Secretary of State, that the prisoner ought not to have been *tried* by court-martial at all, is not supported by that of the Commissioners, who reported that, in their view, the trials by court-martial ought not to have been continued beyond the 30th Oct., whereas, Gordon was tried on the 21st, at which time, the active ringleaders were still at large, and acts of outrage and of armed rebellion still continued (*vide ante*). And their opinion that the evidence was insufficient to sustain the charge, besides being equivocal, and, in one sense, plainly opposed to the facts, would not show the *trial* to have been improper. As to which, *vide ante*, p. 197—283.

(*a*) "Her Majesty's Government have been advised, by the law officers of the Crown, that the effect of the Indemnity Act will not be to cover acts done, either by the Governor or by subordinate officers, unless they are such as (in the case of the Governor) he may have reasonably, and in good faith, considered to be proper for the purpose of putting an end to the insurrection, or such as (in the case of subordinates) have been done under, and in conformity with, the orders of superior authority, or (if done without such orders) have been done in good faith, and under a belief, reasonably entertained, that they were proper for the suppression of the insurrection, and for the preservation of the public peace of the island. As regards all acts done by or under military authority, Her Majesty's Government are advised that the proclamation of martial law, under the Island Statute of 1844, operated within the proclaimed district to give as complete an indemnity as the Indemnity Act itself. But—1. For any acts done beyond

claimed district, under military order and authority; and, with regard to the operation of, or necessity for, an act of indemnity, the Secretary of State, on the advice of the law officers of the Crown, distinctly declared a view of the law, entirely in accordance with the view which has been indicated in this work. He at the same time intimated (*a*) that the Report would be submitted, so far as regarded the conduct of the officers, to the military authorities; and further, that proceedings, of a criminal character might be taken, and that, therefore, certificates under the Indemnity Act ought to be given carefully.

the proclaimed district, the authority of the Act of 1844, and of the proclamation, is inapplicable. 2. Civilians who may have acted *bona fide* for the suppression of the rebellion, although without military authority, would have a protection secured to them by the Indemnity Act, which they might not obtain from the mere operation of martial law. 3. Under the Indemnity Act, the certificate of the Governor is conclusive for the protection of subordinates. I have already directed you, and your own judgment doubtless would have led you to the same conclusion, how careful you must be in giving these certificates; and, with this precaution taken, Her Majesty's Government have determined that the Act of Indemnity ought to be left to its operation."

(*a*) "I have communicated copies of your Report, with the Appendix, to the Secretary of State for War, and to the Lords Commissioners of the Admiralty, who are the proper judges of the conduct of the military and naval officers engaged in these transactions. On my own part, I have to request that you will cause careful investigation to be made, in those cases of civilians which appear to require it, with a view to such further proceedings as may be requisite and just. It will not be desirable to keep alive in the colony the heartburnings connected with these lamentable occurrences, by any very minute endeavour to punish every act which may now be the subject of regret. But great offences ought to be punished. I rely on your Government to accomplish this necessary object, and shall expect to receive a full report of the measures which have been taken with that view. You will, of course, be very careful not to give certificates under the Indemnity Act, in any cases in which there is reasonable ground to question the propriety of giving them." The former part of this passage fully recognizes one of the conclusions pointed to in the previous portions of this work, viz., that mere misconduct of military men in *the execution* of martial law, *i.e.*, in carrying out orders, is a matter of military cognizance, and the subsequent part equally recognizes another conclusion, also pointed to in this work, that acts *not* in execution of orders, *nor* honestly in suppression of a rebellion, but voluntarily, wantonly, and wickedly, being criminal, are (if they are not punished summarily, as they may be under martial law itself), for the cognizance of the criminal courts.

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